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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 170.

JOHN NOONAN AND THOMAS F. MAHAN, APPELLANTS,

vs.

THE CALEDONIA GOLD MINING COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF DAKOTA.

FILED OCTOBER 15, 1883.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 170.

JOHN NOONAN AND THOMAS F. MAHAN, APPELLANTS,

vs.

THE CALEDONIA GOLD MINING COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF DAKOTA.

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1 *Judgment-Roll.*

In the District Court, First Judicial District.

CALEDONIA GOLD MINING COMPANY, Plaintiff,
vs.
JOHN NOONAN and THOMAS F. MAHAN, Defendants. } No. 121.

TERRITORY OF DAKOTA, *County of Lawrence:*

Filed this 27th day of July, A. D. 1882.

B. S. WILLIAMS, *Clerk.*

2 *Notice of Appeal.*

In the District Court of the First Judicial District.

THE CALEDONIA GOLD MINING COMPANY (Formerly Henry Lackey *et al.*), Plaintiff,
vs.
JOHN NOONAN and THOMAS F. MAHAN, Defendants.

TERRITORY OF DAKOTA, } *ss:*
County of Lawrence, }

To the above-named plaintiff and to T. L. Skinner, Esqr., its attorney, and to Frank J. Washabaugh, Esqr., clerk of said district court:

Take notice that the defendants herein, John Noonan and Thomas F. Mahan, and each of them, appeal to the supreme court of the Territory of Dakota from the decision, decree, and judgment herein rendered and filed in the office of the clerk of said district court of the first judicial district of the Territory of Dakota within and for the county of Lawrence in favor of said plaintiff, the Caledo-
3 nia Gold Mining Company, and against said defendant-, John Noonan and Thomas F. Mahan, on the 9th day of March, A. D. 1881, and from each and every part and the whole thereof, and that they also appeal to the supreme court from the order of this court overruling and denying defendants' motion for a new trial herein made and filed on the 9th day of March, A. D. 1881.

Dated Deadwood, D. T., April 17th, 1882.

McLAUGHLIN & STEEL,
Attorneys for Defendants.

4 *Undertaking on Appeal.*

In the District Court of the First Judicial District.

THE CALEDONIA GOLD MINING COMPANY (Formerly Henry Lackey *et al.*), Plaintiff,
vs.
JOHN NOONAN and THOMAS F. MAHAN, Defendants.

TERRITORY OF DAKOTA, } *ss:*
County of Lawrence, }

Whereas, on the 9th day of March, A. D. 1881, the above-named plaintiff, the Caledonia Gold Mining Company, recovered judgment

against the above-named defendants, John Noonan and Thomas F. Mahan, in the above-entitled action and court, in which it was adjudged that said plaintiff is the owner and entitled to the exclusive possession of the Caledonia lode, described in said judgment; that said defendants, their agents, attorneys, and employes, and all persons acting in aid or assistance of them, and each of them, are perpetually enjoined from asserting any claim to said property, and also that said plaintiff have and recover of and from said defendants their costs in this behalf expended, taxed at one thousand nine hundred and forty-two $\frac{65}{100}$ ($1,942.65) dollars, and that they have execution therefor; and whereas the said defendants intend to appeal from said judgment and the order overruling the motion for a new trial in said action to the supreme court of the Territory of Dakota:

Now, therefore, we, Wm. M. Baird and Ben Baer, of the city of Deadwood, county of Lawrence, and Territory of Dakota, undertake, pursuant to the statutes, that the said appellants shall pay all costs and damages that may be- warded against them on such appeal, not exceeding two hundred and fifty dollars ($250.00.)

And whereas the said appellants are desirous of staying the execution of the said judgment, and especially of said judgment for costs in the said sum of $1,942.65: We do also undertake, pursuant to the statute, that if said judgment or any part thereof be affirmed, or the appeal shall be dismissed, the said appellant shall pay the amount directed to be paid by the judgment, or the part of such amount as to which the judgment shall be affirmed, if it be affirmed only in part, and all damages which may be awarded against the appellants on such appeal.

WM. M. BAIRD.
BEN BAER.

TERRITORY OF DAKOTA, } ss:
County of Lawrence, }

On this 17th day of April, A. D. 1882, before me, James S. Mullaly, a notary public in and for said county and Territory, came Wm. M. Baird and Ben Baer, to me personally known to be the persons described in and who executed the foregoing undertaking, and severally acknowledged to me that they executed the same.

[SEAL.] JAMES S. MULLALY.
Notary Public.

TERRITORY OF DAKOTA, } ss:
County of Lawrence, }

Wm. M. Baird and Ben Baer, being duly sworn, each for himself and not one for the other, says that he is one of the subscribers to the foregoing undertaking; that he is a resident and householder within said county and Territory, and is worth the sum of four thousand eight hundred ($4,800) [dollars] over and above all his debts and liabilties, and exclusive of property by law exempt from execution.

WM. M. BAIRD.
BEN BAER.

Subscribed and sworn to before me this 17th day of April, A. D. 1882.

[SEAL.] JAMES S. MULLALY,
Notary Public.

7 (And appears also thereon the following:)

Notice of Appeal and Undertaking.

Due service of the within notice of appeal and undertaking admitted by true copies this 18th day of April, A. D. 1882.

T. L. SKINNER, *Attorney for Pl'ff.*
FRANK J. WASHABAUGH,
Clerk Court.

Filed April 18th, 1882.

FRANK J. WASHABAUGH, *Clerk.*

8 In the District Court of the First Judicial District of Dakota Territory, within and for the County of Lawrence.

HENRY LACKEY, PETER O'NEILL, L. P. ELLIOTT, J. M. MURPHY, M. Heffron, Jas. Lynch, B. Curlin, J. Manning, and John Morrill, Plaintiffs.

vs.

JOHN NOONAN, Defendant.

The Territory of Dakota to the defendant above named:

You are hereby summoned and required to answer the complaint of the plaintiff in the above-entitled action, which will be filed in the office of the clerk of the above-mentioned court at Deadwood, D. T., and to serve a copy of your answer to said complaint upon the subscribers at their office in the city of Deadwood, D. T., within thirty days after the service of this summons on you, exclusive of the day of such service, and if you fail to answer the complaint within the time aforesaid the plaintiffs will apply to the court for the relief demanded in said complaint.

Dated at Deadwood, D. T., this 1st day of June, 1878.

CLAGETT, KINGSLEY AND J. M. MURPHY,
Attorneys for Plaintiffs.

(Endorsed:) Deadwood, D. T., June 15, 1878.

9 I hereby certify and return that the within summons came to my hand June 14th, 1878, and that the within-named defendant, John Noonan, cannot be found in Lawrence county.

JOHN MANNING, *Sheriff,*
By BREWER, *Deputy.*

[Endorsed:] Filed for record this 15th day of June, 1878. A. B. Z. Dawson, clerk.

TERRITORY OF DAKOTA, } *ss:*
Lawrence County, }

By way of further return I certify that since June 15th, 1878, the date of my prior return, I have been able to learn of the where-

abouts of said defendant, John Noonan, and that on the 2d day of July, 1878, I found said Noonan and served said summons on him personally in my county by delivering to and leaving with him a true copy thereof.

Witness my hand this 10th day of July, 1878.

JOHN MANNING, *Sheriff*,
P'r J. G. MORLAY, *Deputy*.

(Endorsed:) Filed June 10th, 1878. A. B. Z. Dawson, clerk.

10 TERRITORY OF DAKOTA, } ss:
Lawrence County, }

In the District Court of the First Judicial District of said Territory in and for said County.

HENRY LACKEY, L. P. ELLIOTT, JOHN M. MURPHY, JAMES LYNCH, Michael Heffron, James Manning, John Morrow, Peter O'Neill, and Robert Curlin, Pl'ff's,

vs.

JOHN NOONAN, Def't.

The above-named plaintiffs complain of the above-named defendant, and for cause of action allege:

That on the 21st day of June, 1876, three of the above-named plaintiffs, to wit, Michael Heffron, Robert Curlin, and James Manning, together with one Michael Lynch, then being citizens of the United States, discovered and located the Caledonia lode, lead, or mining claim, claiming the same 1,500 feet in length and 300 feet in width, being 150 feet on each side of said lode or vein, and on the same location in the mining recorder's office for Whitewood quartz mining district, Lawrence county, Dakota Territory, being the mining district in which said mine was situated.

11 That thereafter, and before the 15th day of March, 1877, the plaintiffs, Henry Lackey, Peter O'Neill, L. P. Elliott, and John M. Murphy, became co-owners in said premises by purchase from some of said locators of certain undivided interest therein.

That on said 15th day of March, 1877, the said Lackey, O'Neill, Elliott, Murphy, Heffron, Michael Lynch, Curlin, and Manning without waiving any right acquired under said location made June 21st, 1876, made a supplementary record in said mining recorder's office, embracing the same ground as before named.

That on the 25th day of April, 1877, plaintiffs caused a notice of theirs said mining claim to be recorded with the register of deeds of said county of Lawrence, which was within — days after the said office was first opened for the transaction of public business.

That said mining claim is situated about one mile from Gayville, in said Lawrence county, on the east side of Shoemaker gulch, north of Clara Hill, and that plaintiffs claim 1,500 feet in length and 150 feet on each side of the lode, vein, or crevice, 500 feet southeasterly from discovery shaft and 1,000 feet northwesterly from said shaft.

That since the location of said mine the plaintiff, John Murry, has become a co-owner therein by purchase with the other plaintiffs.

That ever since said 21st day of June, 1876, the said plaintiffs, either by themselves or their grantory, have been in the continued, actual, peaceable, and lawful possession of said mining claim in good faith, and have at all times complied with the laws of
12 the United States, the Territory of Dakota, and local rules and regulations of the miners of said mining district upon the subject of discovery, location, and preservation of said claims, and have worked and developed the same, expending thereon work, labor, and money to great value, to wit, the value of $5,000.00.

That about the 20th day of April, 1878, the defendant made an application to the U. S. Land Office at Deadwood, Dakota Territory, for a patent to the following-described portion of plaintiffs' said premises, to wit: begining at the southeast corner of said Caledonia Mining Claim and running thence S., 87° 30′, W., a distance of 207.6 feet; thence N. 0° 35′ W. 1,070.7 feet; thence N. 89° 15′ E. 11.3 feet; thence S. 17° 48′ E. 587.5 feet; thence S. 2° 45′ 499 feet to the southeast corner and place of beginning, and containing about 3 and $\frac{57}{100}$ acres.

That on the 15th day of May, 1878, these plaintiffs filed in said office a protest or adverse claim to said application so made by defendant, and on the 14th day of June, 1878, plaintiffs brought this suit, as will fully appear from the summory issued therein.

That the plaintiffs are the lawful owners and in possession of the said ground, and have been during the time and in the manner above stated as against all persons execept the Government of the United States, and that said defendant has no right, title, or interest in or to any part or parcel thereof.

That the defendant claims or pretends to have some title or interest in said ground by virtue of a pretended mining claim known as the Bobtail lode, discovered and located so as to embrace the above-described portion of plaintiff's said claim and under
13 such claim and pretense has made the said application for a patent therefor from the Government of the U. S.

That said defendant further pretends that said Bobtail lode was located and discovered long prior to the discovery and location of the plaintiffs' said Caledonia mine, and that the defendant's title to and interest in said described ground is paramount to and better than that of these plaintiffs, and that he is entitled to a patent therefor from the said U. S.; but plaintiffs aver and charge the truth to be that the said claim and pretenses of said defendant are false, without foundation in fact or in law, and are set up and insisted upon, together with his said application for a patent, for the purpose of annoying and injuring the plaintiffs.

That said defendant, or those through whom he claims to derive his interest in said pretended Bobtail mining claim, have caused to be placed on the records of said Whitewood quartz mining district, and also upon the record-books of the register of deeds of said Lawrence county, a certain pretended notice of the location of said Bobtail mine, embracing in its description the ground, as defendant pretends, in controversy, as above stated; that said pretended location notice so on record claims that said Bobtail lode was discovered on

the 21st day of February, 1876, and recorded in said district recorder's office on the 24th day of the same month; whereas plaintiffs aver and charge the truth to be that no such discovery of any such claim as the Bobtail lode was ever made, nor any valid location thereof, as is well known to said defendant, and that said notice is kept on said records for the purpose of injuring said plaintiffs and to cast a cloud upon their title. And plaintiffs further aver
14 that said defendant pretends to connect himself with said pretended Bobtail location by deed of purchase from the locators thereof, which deed he has caused to be recorded in the records of said register of deeds' office for the purpose of injuring these plaintiffs and casting a cloud upon their title.

All of which pretenses and claims of said defendant are unfounded and false and work manifest injury to and cast a cloud upon the title of these plaintiffs to said premises.

That said defendant threatens to prosecute his said application for a patent and procure the same, so as to embrace the said ground of these plaintiffs so described as aforesaid, unless restrained by this court; all of which will work great injury to the plaintiffs, take from them a valuable portion of their said claim, lead to a multiplicity of suits, and cast a cloud upon their title.

That the paper or diagram hereto attached and marked Exhibit "A" represents correctly the location of plaintiffs' said mining claim and the pretended location of said Bobtail lode, with the ground of plaintiffs embraced in defendant's application for a patent, and heretofore in this complaint described by metes and bounds, and said exhibit is made a part of this complaint for such purpose as it may lawfully subserve, together with whatever it contains.

Wherefore the plaintiffs pray that a temporary writ of injunction may be granted restraining said defendant from any further proceedings under his said application for a patent to that portion of ground embraced within the plaintiffs' said mining claim, and for judgment decreeing the title of said ground to be in plaintiffs;
15 that said Bobtail mining claim has no right or title to said premises; that the location thereof, as the same appears of record, nor any deeds through which defendants deraigns title, does not embrace said ground in controversy; that the right of possession of said premises is in plaintiffs, and that said defendant and all claiming by or through him be forever enjoined from setting up any title to or interest in said ground in controversy herein described by metes and bounds and embraced in his said application for a patent, and also that plaintiffs have judgment for their costs and disbursements in this suit, and for such further relief as may be just and proper.

CLAGETT & KINGSLEY,
Att'ys for Pl'ffs.

TERRITORY OF DAKOTA, } ss:
Lawrence County, }

John M. Murphy, being duly sworn, says that he is one of the plaintiffs named in the foregoing complaint and has heard the same

Exhibit 'A'

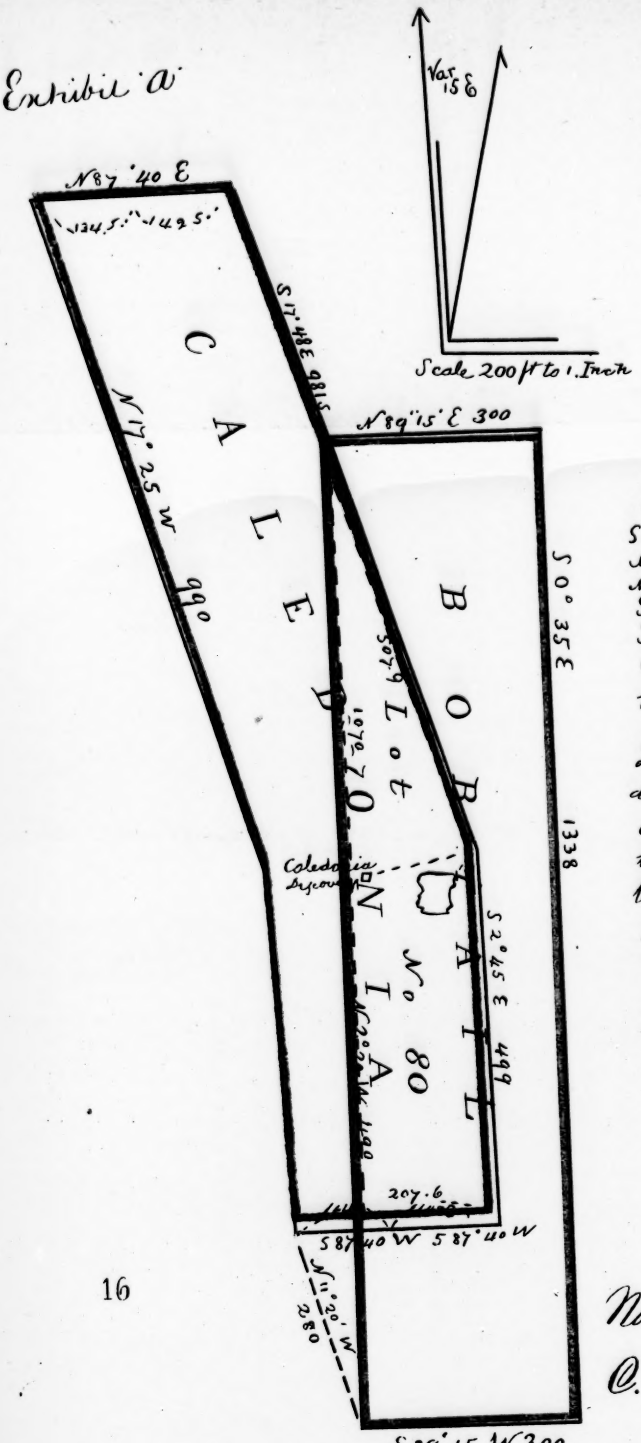

Diagram
showing conflict between the
Caledonia lode
and
Bobtail mine
Lot N 80
Whitewood Mining District
Lawrence Co. S. D.

Description of Conflict Ground

Beginning at South East Corner of Caledonia, running thence
S 87° 40' W 207.6 ft thence
N 0° 35' W 670.7 ft thence
N 89° 15' E 11.3 ft thence
S 17° 48 E 587.5 ft thence
S 2° 25' E 499. ft to the S. E Cor. of Caledonia lode and place of beginning containing 3 57/100 Acres (3 57/100)

I hereby Certify that the above diagram correctly represents the conflict claimed to exist between the Bobtail mine lot No 80, on the Caledonia lode as surveyed by me - and I further certify that the value of labor an improvement on the Caledonia Lode is not less than Two thousand dollars

I D McIntyre
U.S. Deputy Mineral Surveyor

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C. G. M. Co

16

16

read, knows the contents thereof, and that the same is true of his own knowledge, except as to such matters therein stated on information or belief, and as to those matters he believes it to be true.

JOHN M. MURPHY.

Subscribed and sworn to before me this 5th day of July, 1878.

[SEAL.] JAMES T. WATSON,
Notary Public.

(Here follows diagram marked p. 16.)

17 And appears also the following endorsement and filing, to wit: "Complaint." Filed July 8, 1878. A. R. Z. Dawson, clerk, by J. A. Swift.

18 *Answer.*

In District Court, First Judicial Dist.

HENRY P. LACKEY, L. P. ELLIOTT, JOHN M. MURPHY, JAMES LYNCH, Michael Heffron, James Manning, John Morrow, Peter O'Neill, and Robert Curlin, Plaintiffs,

vs.

JOHN NOONAN, Defendant.

TERRITORY OF DAKOTA, } *ss:*
County of Lawrence, }

1. The said defendant, for answer to the complaint of the plaintiffs herein, denies each and every allegation therein contained except such as are hereafter admitted.

2. Further answering said complaint, defendant denies that on the 21st day of June, 1876, that the defendants, Michael Heffron, Robert Curlin, and James Manning, together with one Michael Lynch, discovered and located the Caledonia lode or mining claim, 1,500 feet in length by 300 feet in width, in the Whitewood quartz mining district, Lawrence county, Dakota Territory, but alleges the fact to be that said parties last named about that date unlawfully entered upon the Bobtail Lead mining claim, a valid mining location

19 near the head of Shumashe gulch, in said district, county, and Territory, made long prior to that time, and pretended to make the discovery of a vein or lode of mineral-bearing quartz within the lines of the Bobtail lead location, and did pretend to make a mining location by virtue of that discovery upon a large portion of the ground already appropriated under the mining laws of the United States and of the Territory of Dakota in the Bobtail lead location. Defendant alleges that said last-named parties well knew at the time of making said pretended location of the Caledonia lode that the said discovery of ore by said parties was within the limits of the Bobtail Lead mining claim, and well knew that the said Caledonia location conflicted with the said Bobtail location to about the extent of three and one-half acres of ground.

3. Further answering said complaint, said defendant alleges that he is the owner of and entitled to the possession of that certain

quartz mining claim situated near the head of and on the east side of Shumache gulch, in the Whitewood quartz mining district, Lawrence county, Dakota Territory, known as and called the Bobtail lead, and more particularly described as follows, to wit: Commencing at a corner, No. 1, which is the northwest corner of said Bobtail Lead mining claim, which is a stone 20x12x8 inches set in ground and in a mound of rock marked No. 1 on one side and M. C. 80 on the opposite, from which corner U. S. locating monument No. 3 bears north 36° 50′ west 2,592 feet distant, and the head of Bobtail gulch bears south 69° 10′ west, about 2,000 feet distant from this corner so established and marked as No. 1; thence north 89° 15′ east 3,000 feet; thence south 0° 45′ east 1,340 feet; thence
20 south 89° 15′ west 300 feet; thence north 0° 45′ west 1,340 feet to the place of beginning, and containing nine and $\frac{23}{100}$ acres of ground.

Defendant further alleges that said Bobtail lead was duly located on the 24th day of February, 1876, by H. S. Ireton, F. E. Carey, and D. G. Chizun; that the necessary and requisite work and improvement upon said mining location — each year thereafter; that the whole amount of work and improvement done upon said Bobtail Lead mining location up to February 24th, 1878, was of the full value of five hundred dollars by said locators and their successors in interest, and that the location notice of said Bobtail lead was duly recorded in said Whitewood quartz mining district and in the office of the register of deeds of said county of Lawrence, and that this defendant is the owner by purchase from the grantee of said locators.

4. Further answering said complaint, defendant admits that on or about the 20th day of April, 1878, he applied through the United States Land Office for a patent to the ground included within the limits of the said Bobtail Lead location, as he had good right to do, and that said application is still pending in said office in consequence of adverse claims being filed therein by these plaintiffs and other parties to the ground included in said application, or some portion thereof.

5. Further answering said complaint, defendant denies all and all manner of charges of bad faith towards plaintiffs or any other person in connection with said Bobtail lead and his title thereto.

21 Wherefore, said defendant prays that he may be adjudged and decreed to be the owner of and entitled to the possession of that portion of said Bobtail lead with which the said Caledonia lode conflicts, and which is described in the complaint; that the plaintiffs and those claiming by, through, and under them may be adjudged to have no estate, right, title, or interest in any part or portion of said Bobtail lead, and that this defendant have judgment for his costs in his behalf expended, and for such other and further relief as may seem meet.

McLAUGHLIN & STEELE,
Attorneys for Defendant.

COUNTY OF *Larimie:*

John Noonan, being first duly sworn, deposes and says that he is the defendant named in the foregoing entitled action; that he has read the foregoing answer, knows the contents thereof, and knows the same to be true of his own knowledge.

JOHN NOONAN.

Subscribed and sworn to before me this 14th day of October, 1878.

[SEAL.] A. R. Z. DAWSON, *Clerk*,
By J. A. SWIFT, *Deputy.*

(Endorsed:) Answer. Service acknowledged Oct. 14, 1878. Claggett & Kingsley, att'y- for pl'ff. Filed October 14, 1878. A. R. Z. Dawson, clerk.

22 TERRITORY OF DAKOTA, } *ss:*
Lawrence County, }

In the District Court of the First Judicial District of said Territory in and for said County.

HENRY LACKEY, L. P. ELLIOTT, PETER O'NEILL, JOHN M. MURPHY, James Lynch, Michael Heffron, James Manning, John Morrow, and Robert Curlin, Pl'ffs,

vs.

JOHN NOONAN, Def't.

Now, on this 24th day of January, 1879, comes on to be heard the motion of the Caledonia Gold Mining Company to be substituted as party plaintiff in the above-entitled action in the place of above-named plaintiffs; and thereupon comes Clagett & Kingsley in support of said motion, and Daniel McLaughlin, Esq., attorney for said defendant, John Noonan, comes also; and the court having read the affidavit of John M. Murphy in support of said motion, and the said attorney for the defendant being present and not resisting nor contending to said motion, and it appearing to the court that said Caledonia Gold Mining Company is the proper party to be made plaintiff in said action, it is ordered that the said Caledonia Gold Mining Company be, and it is hereby, substituted in the place of said above-named plaintiffs as plaintiff in the above-entitled cause now pending in this court, provided that this order shall not prejudice any rights which the defendant now has as against the
23 original plaintiffs.

By the court:

G. C. MOODY, *Judge.*

(Endorsed:) Order substituting Caledonia Gold Mining Co. as pl'ff. Filed Jan. 24, 1879. A. R. Z. Dawson, clerk.

24 *Amended and Substituted Complaint.*

TERRITORY OF DAKOTA, } ss:
County of Lawrence, }

In the District Court of the First Judicial District of said Territory within and for said County.

THE CALEDONIA GOLD MINING COMPANY (Formerly Henry Lackey, Louis P. Elliott, John M. Murphy, James Lynch, Michael Heffron, James Manning, John Morrow, Peter O'Neill, and Robert Curlin), Plaintiff,

vs.

JOHN NOONAN, Defendant.

Now comes the above-named plaintiff, The Caledonia Gold Mining Company (which by order of court hereinbefore made, January 23d, 1879, was substituted as plaintiff in this action in place of the said Henry Lackey, Louis P. Elliott, John M. Murphy, James Lynch, Michael Heffron, James Manning, John Noonan, Peter O'Neill, and Robert Curlin, the former plaintiff herein) and files this its complaint as a substitute for its last amended complaint, which was herein filed and served September 13th, 1879, and has since been destroyed by fire or lost, and for cause of action against the above-named defendant, John Noonan, alleges:

1st. That this plaintiff is now and has been ever since the 19th day of September, 1878, a corporation duly created and organized under and by virtue of the laws of the State of California,
25 and doing business in the said county of Lawrence and Territory of Dakota, and has complied with all the provisions and requirements of the laws of Dakota in regard to foreign corporations, and is now and has been since said 19th day of September, A. D. 1878, authorized under said laws to transact business and to acquire, hold, and dispose of real, personal, and mixed property within said Territory.

2d. That heretofore, to wit, on the 30th day of August, A. D. 1878, and after the commencement of this action, the said Henry Lackey, Louis P. Elliott, John M. Murphy, James Lynch, Michael Heffron, James Manning, John Morrow, Peter O'Neill, and Robert Curtin, the former plaintiffs herein, who were the owners and in the possession of the Caledonia quartz lode and mining claim, hereinafter particularly described, sold and conveyed said claim by deed of said date to one Thomas Bell, which deed was fully acknowledged, and was on the 31st day of August, A. D. 1878, recorded in the office of the register of deeds of said Lawrence county, Dakota Territory; and afterwards, to wit, on the 10th day of December, A. D. 1878, and after the commencement of this action, the said Thomas Bell, who was then the owner and in the possession of the Caledonia quartz lode and mining claim, sold and conveyed the same by deed of that date to this plaintiff, The Caledonia Gold Mining Company, which deed was duly acknowledged and was afterwards, to wit, on the 18th day of December, A. D. 1878, recorded in the office of the register of deeds of said Lawrence county, Dakota Territory, and this plain-

tiff, upon said sale and conveyance to it, became the owner of and entitled to the possession of the said property, and entered into the actual possession of the same and succeeded to all the title and right of said former plaintiffs therein and thereto.

26 3d. That heretofore, to wit, in the month of June, 1870, at the said county of Lawrence and Territory of Dakota, the said Michael Heffron, Robert Curlin, James Manning, and one Michael Lynch discovered upon the public domain of the United States a well-defined vein or lode of rock in place containing valuable deposits of gold, and thereafter, to wit, on the 21st day of June, A. D. 1876, located and appropriated in accordance with the laws of the United States and the Territory of Dakota and the local rules, customs, and regulations of the miners of Whitewood quartz mining district (within which said claim was situated) a quartz lode mining claim, including within its limits the vein or lode discovered by them as aforesaid, and being fifteen hundred (1,500) feet in length along said vein or lode (five hundred feet in a southeasterly direction and one thousand feet in a northwesterly direction from the discovery shaft) and three hundred (300) feet in width (one hundred and fifty feet on each side of the centre of said vein or lode) and situated on the east side of the Shoemaker gulch, and about eight hundred feet northwest of the Clara mine in Whitewood quartz mining district, in the said county of Lawrence and Territory of Dakota, and called and named said claim and lode the Caledonia quartz lode and claim, and maked the same so that its boundaries could be readily traced and entered upon, and took actual possession thereof; and on the same day, to wit, on the 21st day of June, A. D. 1876, caused to be recorded in accordance with the local rules, customs, and regulations of the miners of said Whitewood quartz mining district a certificate or notice of location of said claim in the mining records of said Whitewood quartz mining district, and afterwards caused the same to be recorded in the office

27 of the register of deeds of said Lawrence county, Dakota Territory.

That afterwards, to wit, on the 15th day of March, 1877, the said Michael Heffron, Michael Lynch, Robert Curlin, and James Manning, together with Henry Lackey, Peter O'Neill, Louis P. Elliott, and John M. Murphy, who were the grantees and successors in interest of said Heffron, Lynch, Curlin, and Manning in and to certain individual interest in said Caledonia quartz claim, and all of whom were then the owners of and in the possession of said claim, made an additional and supplementary claim and location of said Caledonia claim as above described, and on the same day caused a certificate or notice of said original claim and location and of said additional and supplementary claim and location to be recorded in the mining records of said Whitewood quartz mining district, and afterwards, to wit, on the — day of April, A. D. 1877, and within a reasonable time after the office of the register of deeds of said Lawrence county, Dakota Territory, was open for the transaction of business, caused a like certificate or notice of said original claim and location and of said additional and supplementary claim and loca-

tion of said Caledonia lode claim to be recorded in the office of the said register of deeds of said county of Lawrence.

4th. That at the time of the commencement of this action and up to the time of the sale and conveyance by them to T-omas Bell, heretofore stated, the former plaintiffs in this action were, and they and their grantors and predecessors in interest ever since the said 21st day of June, A. D. 1876, had been, the owners of and entitled to and in the actual and continuous possession under claim of title of the said above-described Caledonia quartz lode and mining claim, and every part thereof, and that by virtue of the conveyance to it from said Thomas Bell above mentioned this plaintiff has succeeded
28 to all the titles and rights of said former plaintiffs herein and of said Bell in and to said lode and claim, and is now the owner and entitled to the possession of the same and every part thereof, and that it and its grantors and predecessors in interest have been in the actual and continuous possession of the said lode and claim, claiming title thereto, ever since the 21st day of June, A. D. 1876, aforesaid, and have at all times held and possessed the same in accordance with the laws of the United States and of the Territory of Dakota, and the local rules, customs, and regulations of the miners of the said Whitewood quartz mining district, and have worked and mined the same and expended in labor and money a large amount, to wit, more than five thousand dollars, in the improvement and development of said lode and claim.

5th. That the above-named defendant, John Noonan, claims to have some right in or title adverse to plaintiff and its grantors and predecessors in interest to that portion of said Caledonia quartz lode and mining claim which is described as follows, to wit:

Beginning at the southeast corner of said Caledonia mining claim and mining (with a variation of 15° east); thence south 87° 40′ west 207.6 feet; thence north 0° 35′ west 1,070.7 feet; thence north 89° 15′ east 11.3 feet; thence south 17° 48 east 587.5 feet; thence south 2° 45′ east 499 feet to the southeast corner of the Caledonia claim and place of beginning, containing three and $\frac{57}{100}$ acres.

6th. That, as plaintiff is informed and believes, the right and title claimed by defendant in and to said portion of said Caledonia claim above described is under and by virtue of a certain alleged claim and location of a quartz mining claim called the Bobtail lode, which is claimed by defendant to have been
29 made in the month of February, A. D. 1876, by certain persons under whom defendant now professes to claim title and to include that portion of the Caledonia lode above described; that said claim of defendant has no foundation in fact, and is without right or equity; that no valid discovery or location of said Bobtail claim was ever made by the parties under whom defendant claims, and that the alleged conveyances thereof by said parties to defendant and those under whom he claims conveyed no right or title thereto, and that plaintiff is the owner and entitled to the possession of said portion of said Caledonia lode above described against defendant and all other persons.

7th. That notwithstanding the premises the defendant still claims

title and right to said portion of said Caledonia lode claim above mentioned, and has caused to be placed upon the mining records of the Whitewood quartz mining district, and also upon the records in the office of the register of deeds of said Lawrence county, Dakota Territory, certain pretended certificates or notices of location and claim of said Bobtail claim, stating the same to have been located in the month of February, A. D. 1876, and upon the records in the said office of the said register of deeds certain pretended conveyances to him and parties under whom he claims of interest in said alleged Bobtail claim, including that portion of the Caledonia lode above described, and did, on or about the 20th day of April, A. D. 1876, make and file in the United States land office at Deadwood, in said Lawrence county, Dakota Territory, his application for a patent from the United States to the said Bobtail claim, including that portion of the Caledonia lode above described, and claiming to be the owner thereof and entitled to a patent therefor; that afterwards, and within the time required by law, to wit, on or about the 15th day of May, A. D. 1878, the former plaintiffs herein,
30 who were then the owners and in possession of said Caledonia lode, made and filed in said land office their protest and adverse claim against defendant's application for a patent to said portion of said Caledonia lode claim above described, which was allowed; and afterwards, and within the time prescribed by law, to wit, on the 14th day of June, A. D. 1878, said former plaintiffs commenced this action to determine the right of possession to said portion of said Caledonia lode, and thereupon proceedings for patent by defendant were stayed in said land office until the determination of this action.

8th. That defendant's claim to an estate or interest in said portion of said Caledonia lode above described is adverse to plaintiff and claimed by defendant as prior in time and paramount in right to the right and title of plaintiff therein, and that, although said claim of defendant is false and without right or equity, the acts of defendant above rested in placing upon the record claims to and conveyances of said alleged Bobtail claim, and claiming title to said portion of the Caledonia lode above described as against plaintiff, and in applying for a patent therefor, as above recited, cast a cloud upon the right and title of plaintiff to said portion of said Caledonia lode, and embarass and interfere with plaintiff in its ownership, use, and disposition thereof, and that the defendant threatens to persist in his said application for patent thereto.

9th. That the paper and diagram attached to and made part of the original complaint in this action, and marked Exhibit "A," is a correct representation of said alleged Bobtail claim, as claimed by defendant in his application for patent above mentioned, and of the Caledonia lode claim of plaintiff, and shows the conflict between the two said claims and the ground in controversy herein, and said Exhibit "A" is hereby referred to for description and made part of this complaint.

31 Wherefore plaintiff asks the aid of this court in the premises and prays that defendant answer herein and set out particu-

larly his claim to said portion of said Caledonia lode claim above described by metes and bounds and the nature of said claim; that defendant be restrained and enjoined from further prosecuting his application for patent from the United States to said portion of said lode; that it be adjudged and decreed by the court that plaintiff is the owner and entitled to the possession of said portion of said lode, and that the right of possession thereto is in the plaintiff; that defendant has no estate or interest therein or right or title thereto, and that his claim thereto as against plaintiff is invalid and of no effect; that defendant be perpetually enjoined from hereafter claiming or asserting as against plaintiff any right or title in or to said portion of said lode under or by virtue of said alleged Bobtail claim location or otherwise, and that plaintiff have such other and further decree and relief in the premises as the nature of the case may require and as to equity belongs, and that it recover of defendant its costs in this action.

JOHN M. MURPHY AND
CLAGETT & DIXON,
Att'ys for Plaintiff.

TERRITORY OF DAKOTA, } ss:
Lawrence County, }

A. T. Bigby, being duly sworn, says that he is an officer and superintendent and general agent in said Territory of the Caledonia Gold Mining Company, and has charge and management of
32 the business of said company in said Territory; that he has heard read the foregoing complaint, in which the said Caledonia Gold Mining Company is plaintiff and John Noonan is defendant, and that said complaint is true to the knowledge of affiant, except as to those matters stated on information and belief, and as to those matters he believes it to be true.

A. J. BIGBY.

Subscribed and sworn to before me this 31st day of October A. D. 1879.

[SEAL.] MOSES LIVERMAN,
Notary Public.

(Appears also thereon the following endorsements, filings, etc., to wit:)

We hereby acknowledge service by copy of the within and foregoing complaint this 5th day of November, A. D. 1879, and it is agreed that the within and foregoing stand as the amended complaint in said action and as a substitute for the amended complaint hereinbefore filed and served 13th September, A. D. 1879, and now lost or destroyed, defendant to have thirty days from this date to answer herein.

Deadwood, D. T., Nov. 5th, 1879.

McLAUGHLIN & STEELE,
Att'ys for Def't.

Filed Nov. 6th, 1879.

A. R. Z. DAWSON, *Clerk.*

33 *Answer.*

In District Court, First Judicial District.

The CALEDONIA GOLD MINING COMPANY (Substituted as Plaintiff, by Leave of Court, in the Place of Henry Lackey, Louis P. Elliott, John M. Murphy, James Lynch, Michael Heffron, James Manning, John Morrow, Peter O'Neill, and Robert Curlin), Plaintiff,

against

JOHN NOONAN, Defendant.

TERRITORY OF DAKOTA, } *ss:*
County of Lawrence, }

1. The defendant above named, for answer to the complaint of plaintiff herein, served and filed as the amended and substituted complaint, denies each and every allegation contained therein, except such as are hereafter admitted.

2. Further answering said complaint, defendant says that he has no knowledge or information sufficient to form a belief whether or not the said plaintiff is a corporation duly created and organized under and by virtue of the laws of the State of California, or whether or not it has complied with all of the provisions and require-
34 ments of the laws of Dakota Territory in regard to foreign corporations, or whether or not it is now and has been since said 19th day of September, 1878, authorized under said laws to transact business and to acquire, hold, and dispose of real, [illegible]sonal, and mixed property within said Territory, and remands th[illegible]ntiff to its proofs.

3. Further answering said complaint, defendant admit[illegible]e did, at the commencement of this action, claim to be the owner of the Bobtail lead, a quartz mining claim situated on the easterly side of Shcumache gulch, in Whitewood quartz mining district, Lawrence county, Dakota Territory, and that he had made application for a United States patent for said quartz mining claim, as stated in said complaint, and that said Henry Lackey and the others who were plaintiffs herein filed their protest against said application in the United States land office at Deadwood, in said county and Territory, and commenced their action in this court to determine the right of possession to the ground alleged to be in conflict between the pretended Caledonia lode and the Bobtail lead, amounting to about three and fifty-seven one-hundredths (3.57) acres.

4. Further answering said complaint, and as a defense and counter-claim thereto, this defendant alleges that on or about the 24th day of February, 1876, H. S. Ireton, D. G. Chizum, and Thomas E. Carey, then being citizens of the United States, discovered upon the public mineral lands of the United States a vein or lode of valuable gold-bearing ore near the head of Schumache gulch and on the east side thereof, and did duly locate a quartz mining claim thereon about the date last above named, along the vein or lode northwardly from the place of discovery fifteen hundred feet in length by a width of one hundred and fifty feet on each side of the centre
35 of the vein, caused a discovery shaft and cut to be sunk and

a discovery stake and location notice to be erected at said cut, and labor and improvements to be done upon said lode each year thereafter of not less than one hundred dollars in value after its said location.

That thereafter, to wit, on or about the second day of March, 1876, *and* Thos. E. Carey sold and conveyed all his right, title, and interest in said Bobtail lead to his colocators, H. S. Ireton and D. G. Chizum, who were then in the exclusive possession of the same; that on or about the first of March, 1877, said H. S. Ireton, representing and pretending to have due power and authority from said D. G. Chizum to sell and convey the right, title, and interest of said D. G. Chizum in and to said Bobtail lode, sold and conveyed said Bobtail lode to one Thomas F. Mahan, and executed and delivered to said Mahan about the date last named a deed of conveyance purporting to sell and convey said Bobtail lode to said Mahan, and subscribed the deeds of conveyance as a grantor, and subscribed the name of said D. G. Chizum as a grantor to said deed "by H. S. Ireton, attorney-in-fact;" that said Mahan is the grantor of this defendant, and believed and relied upon the representation and statements of said Ireton as to his authority and power to represent and act for said Chizum in the sale of said Bobtail lead, and, so believing, received and accepted said deed of conveyance of the Bobtail lead; that said representations of said Ireton in relation to his having authority and power from said D. G. Chizum to sell and convey all his right, title, and interest in said Bobtail lead were untrue, so that said Mahan on or about the 8th day of October, 1878, purchased from said Chizum all his right, title, and interest in and to said Bobtail lead.

36 That on or about the 15th day of March, 1877, and while said Mahan believed himself to be the sole owner, by purchase, of said Bobtail lead, and being in the actual possession of the same, he relocated the same in his own right and name, and had the same duly recorded in the records of the Whitewood quartz mining district, and also had the same duly recorded in the office of the register of deeds of Lawrence county, Dakota Territory, on or about the 12th day of May, 1877.

5. Further answering said complaint, and as a defense and counter-claim thereto, defendant alleges that on or about the 1st day of December, 1877, said Thomas F. Mahan sold and conveyed all his right, title, and interest in and to said Bobtail lead to this plaintiff; that after the commencement of this action said Mahan became the owner by purchase of all the right, title, and interest of said D. G. Chizum in and to said Bobtail lead, and there is therefore a non-joinder of parties defendant, and said Chizum or Mahan is a necessary party to a complete determination of this controversy.

6. Further answering said complaint, and as a defense and counter-claim thereto, defendant alleges that on or about the 16th day of June, 1876, the former plaintiffs, Michael Heffron, Robert Curlin, James Manning, and one Michael Lynch, went upon and within the lines of said Bobtail lead and pretended to make a discovery of gold-bearing ore thereon, and, in virtue of said pretended discovery, pre-

tended to make a location of a quartz mining claim there, and which embraced three and $\frac{57}{100}$ acres of the Bobtail lead, and which is the ground now in conflict in this action, and which conflict will more fully appear by reference to the diagram hereto attached and
37 marked Exhibit "A," and which is made a part of this answer. Said pretended location was and is now called the Caledonia lode.

Defendant alleges that said Caledonia lode location was made within the surface boundaries of the prior valid location of the Bobtail lead and was and is an invalid, void location.

7. Further answering said complaint, and as a defense and counter-claim thereto, defendant alleges that at and before the time of the substitution of The Caledonia Gold Mining Company as plaintiff herein he and said Thomas F. Mahan were the owners of said Bobtail lead, more particularly described as follows, to wit:

Beginning at a corner number one, which is the northwest corner of said claim and is a slate stone 20 x 12 x 8 inches, set in the ground and in a mound of rock, marked M. C.' 80 on one side and No. 1 on the opposite, from which corner locating monument No. 3 bears north 36° 40′ west, 2,875.75 feet distant; a pine tree 14 inches — bears north 51° east, 14.8 feet distant; the head of Bobtail gulch bears north 69° 10′ west, about 2,000 feet distant; the west side centre stake — Oro Fino lode bears 69° 25′ west, about 1,200 feet distant, and a high peak bears south 55° west, about 5,000 feet distant.

First course.

Thence north 89° 15′ east, var. 15° east 150 feet, to north centre and stake of said claim, from which the discovery shaft of said claim bears south 0° 45′ east, 1,279 feet distant; thence 150 feet to corner No. 2, being the northeast corner of said claim, a pine post
38 60 x 6 x 6 inches, set in the ground 2 feet and in mound of rock 2 feet high, marked No. 2 on one side and M. C. 80 on the opposite; a pine stump 24 x 12 x 6 inches bears north 89° 35′ east, 2 feet distant.

Second course.

Thence south 0° 45′ east, var. 15° east, 1,340 feet, to corner No. 3, a pine post set in the ground and in a mound of rock, marked No. 3 on one side and M. C. 80 on the opposite.

Third course.

Thence south 89° 15′ west, var. 15° east, 300 feet, to corner No. 4, a pine post set in the ground marked No. 4 on one side and M. C. 80 on the opposite.

Fourth corner.

Thence north 0° 45′ east, var. 15° east, 1,340 feet, to corner No. 1, the place of beginning, containing nine and $\frac{23}{100}$ acres.

That said plaintiff, the Caledonia Gold Mining Company, about the first of December, 1878, unlawfully and wrongfully entered upon the northerly part of said Bobtail lead, to wit, the ground in controversy herein, and mined, extracted, removed, and converted

to its own use about twenty thousand tons of valuable gold-bearing ore from said Bobtail lead and the property of this defendant and Thomas F. Mahan, of the average value of about nine dollars per ton, to the great injury and damage of defendant and said Mahan in the full sum of one hundred thousand dollars.

Wherefore defendant prays that it may be adjudged and decreed by the court that defendant is the owner, and as against said plaintiff is entitled to the possession, of said Bobtail lead and each
39 and every portion thereof; that it may be further decreed that said plaintiff has no estate, *no estate*, right, title, or interest therein; that said defendant have payment for one hundred thousand dollars, his damages sustained as aforesaid, and costs of this action.

McLAUGHLIN & STEELE,
Att'ys for Defendant.

TERRITORY OF DAKOTA, } ss:
County of Lawrence, }

John Noonan, being first duly sworn, deposes and says that he is the defendant named in the foregoing-entitled answer; that he has heard read the same, knows the contents thereof, and knows the same to be true of his own knowledge, except such matters as are therein stated on information and belief, and as to such matters he believes to be true.

JOHN NOONAN.

Subscribed and sworn to before me this 20th day of November, A. D. 1879.

[SEAL.] H. H. MUND,
Notary Public.

(Appears also the following endorsements & filing, to wit:)

"Service accepted on the within this 28th day of November, 1879. Clagett & Dixon and John M. Murphy, atty's for plaintiff. Filed December 6, '79. A. R. Z. Dawson, clerk, by Frank J. Washabaugh, deputy."

(Here follows diagram marked p. 40.)

41 *Replication.*

In the District Court of the First Judicial District of Dakota Territory in and for Lawrence County.

THE CALEDONIA GOLD MINING COMPANY (Formerly Henry Lackey *et al.*), Plaintiff,
vs.
JOHN NOONAN, Defendant.

Now comes the above-named plaintiff, and for replication to the answer of defendant to the amended and substituted complaint herein filed, denies each and every allegation in said answer contained, except such as are admissions of the matters stated in said complaint, and such as are hereinafter specifically admitted.

1st. And plaintiff, further replying to that portion of said answer which sets up an alleged defense and counter-claim and is marked 4, denies that on or about the 24th day of February, 1876, or at any other time, H. S. Ireton, D. G. Chizum, and Thos. E. Carey, or any or either of them, discovered upon the public mineral lands of the United States any vein or lode of valuable gold-bearing or other ore, near the head of Shumache gulch and on the east side thereof, or elsewhere, or did duly or at all locate any quartz mining claim, about said date above named or at any other time, along said vein or lode, northwardly or in any other direction from the place of dis-
42 covery, fifteen hundred or any other number of feet in length by a wi-th of one hundred and fifty or any other number of feet on each side of the center of any vein, or caused a discovery shaft or cut to be sunk or a discovery stake or location notice to be erected at any such cut, or labor improvements to be done upon any such alleged lode, each or any year thereafter, of the value of not less than one hundred dollars after the alleged location.

And plaintiff denies that on or about the 2d day of March, 1876, or at any other time, Thos. E. Carey sold or conveyed all or any of his right or title or interest in the alleged Bobtail lead to his alleged colocators, H. S. Ireton or D. G. Chizum, or either of them, and denies that said Ireton and Chizum or either of them were then or at any time in the exclusive or other possession of the alleged Bobtail lead or any part of it. And plaintiff avers that it has no knowledge or information sufficient to form a belief as to whether or not, on or about the first day of March, 1877, or at any other time, said H. S. Ireton, representing or pretending to have due or any other power or authority from said D. G. Chizum to sell or convey the right or title or interest of said D. G. Chizum in or to said alleged Bobtail lode, sold or conveyed said alleged Bobtail lode to one Thomas F. Mahan, or executed or delivered to said Mahan, about the date last named or at any other date, a deed of conveyance purporting to sell or convey said Bobtail lode to said Mahan, or subscribed any deed of conveyance as a grantor, or subscribed the name of said D. G. Chizum as a grantor to any deed "by H. S. Ireton, attorney-in-fact," or otherwise, or whether or not said Mahan is the grantor of defendant, or whether or not said Mahan believed or relied upon any representations or statements of said Ireton as to his authority or power to represent or act for said Chizum in the
43 alleged sale of said alleged Bobtail lead, or whether or not said Mahan, so believing or otherwise, or at all received or accepted said or any deed of conveyance of the alleged Bobtail lead, or whether or not said representations, alleged to have been made by said Ireton in relation to his having power or authority from said D. G. Chizum to sell or convey all or any of his right or title or interest in said alleged Bobtail lead, were untrue, or whether or not said Mahan, on or about the 8th day of October, 1878, or at any other time, purchased from said Chizum all or any of his right or title or interest in or to said alleged Bobtail lead; and plaintiff demands strict proof from defendant of each and all of said matters and things.

And plaintiff avers that if any deed, conveyance, or grant of any right, title, or interest of, in, or to said alleged Bobtail lode, or any part thereof, was ever made or delivered by the said Ireton and Chizum, or either of them, to said Mahan, such deed, conveyance, or grant was and is void, in that, at the time of the making and delivery of any such deed, conveyance, or grant, the property and mining ground in controversy in this action was in the actual possession of Michael Heffron, Robert Curlin, James Manning, and Michael Lynch and their grantees (all of whom are the grantors and predecessors in interest of plaintiff of the property herein in controversy), and who then claimed and held said property under a title adverse to that of said Ireton and said Chizum and each of them, to wit, under the location of the Caledonia lode described in the complaint.

And plaintiff further avers that if any deed, conveyance, or grant of any right, title, or interest in or to said alleged Bobtail lead, or any part of it, was made or delivered by the said Chizum o
44 the said Mahan on or about the 8th day of October, 1878, or at any other time, such deed, conveyance, or grant was and is void, in that at the time of the making and delivery thereof t he mining ground and property in controversy in this action was in the actual possession of Michael Heffron, Robert Curlin, James Manning, and Michael Lynch and their grantees (all of whom are the grantors and predecessors in interest of plaintiff in the property herein in controversy), and who then claimed and held said property under a title adverse to that of said Chizum, to wit, under the location of the Caledonia lode described in the complaint.

And plaintiff denies that on or about the 15th day of March, 1877, or at any other time, or while said Mahan believed himself to be the sole owner by purchase of said alleged Bobtail lead, or at any other time, or being in the actual or other possession thereof, he relocated the same in his own right or name or otherwise, or had the same duly recorded in the records of the Whitewood quartz mining district, or in the office of the register of deeds of Lawrence county, Dakota Territory on or about the 12th day of May, 1877, or at any other time.

And plaintiff avers that at the time of the alleged relocation of said alleged Bobtail lead by said Mahan the mining ground in controversy in this action was in the actual, exclusive, and adverse possession of Michael Heffron, Robert Curlin, James Manning, and Michael Lynch and their grantees (all of whom are the grantors and predecessors in interest of plaintiff in said ground), who had before that time duly located and appropriated the same as part of the Caledonia lode claim, as set forth in the complaint, and who then had claimed and possessed the same under said Caledonia location and under a title adverse to that of said Mahan and those under whom he claimed.

45 And plaintiff, further replying to that portion of said answer which sits up an alleged defense and counter-claim, and is marked 5, denies that on or about the 1st day of December, 1877, or at any other time prior to the month of May, 1878, said Thomas

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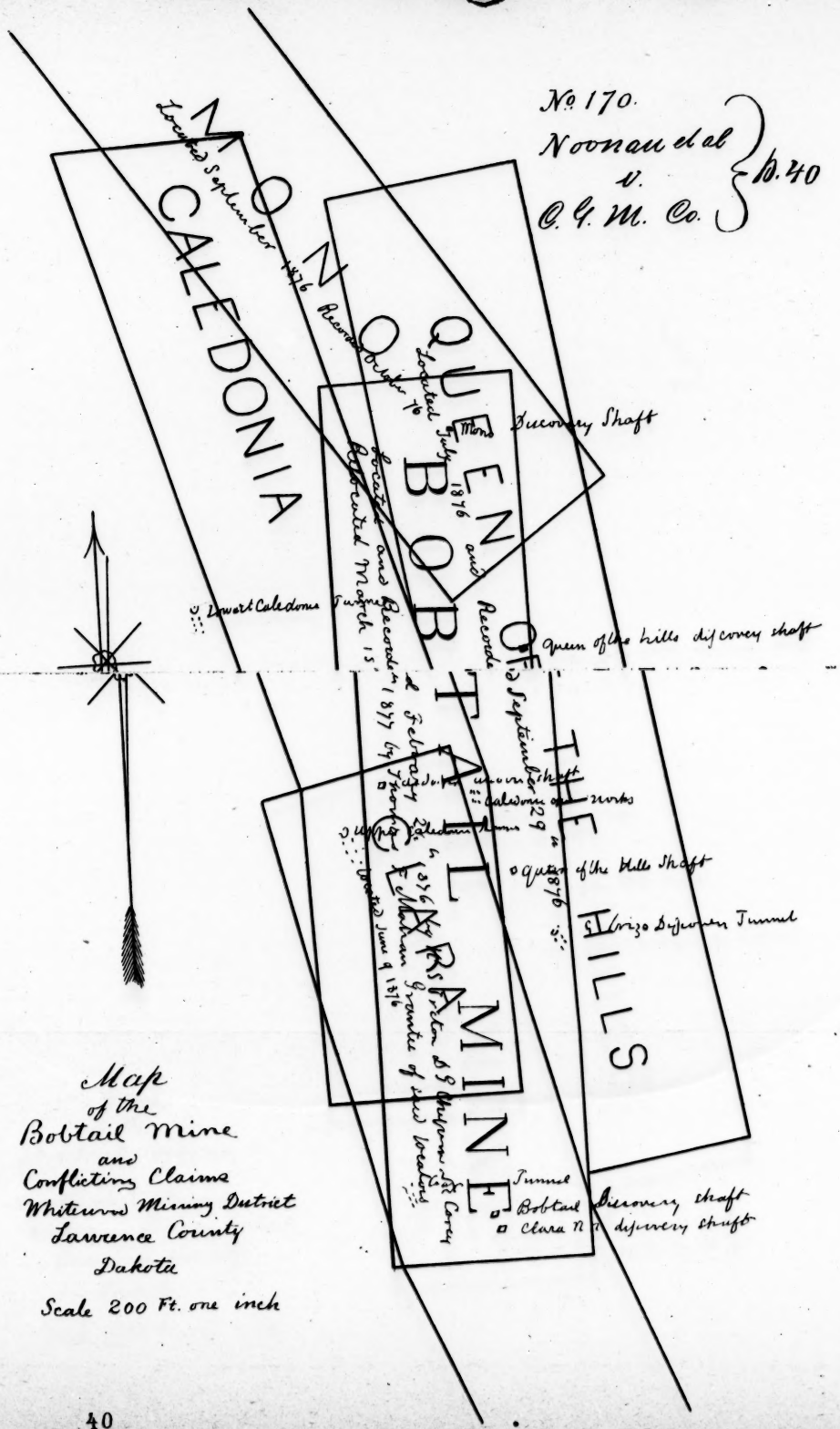

Map
of the
Bobtail Mine
and
Conflicting Claims
Whitewood Mining District
Lawrence County
Dakota

Scale 200 Ft. one inch

40

F. Mahan sold or conveyed all or any of his right or title or interest in or to said alleged Bobtail lead to defendant, and denies that after the commencement of this action, or at any other time, said Mahan became the owner, by purchase or otherwise, of all or any of the right or title or interest of said D. G. Chizum in or to said alleged Bobtail lead, and denies that there is any non-joinder of parties defendant, or that said Chizum or Mahan is a necessary party to the complete determination of this controversy.

And plaintiff avers that if any pretended deed, conveyance, or grant of any pretended right, title, or interest in or to said alleged Bobtail lead was ever made or delivered by said Mahan to defendant, the same was and is void, in that at the time of the making and delivery thereof the mining ground in controversy in this action was in the actual possession of Michael Heffron, Robert Curlin, James Manning, and Michael Lynch, and their grantees (all of whom are the grantors and predecessors in interest of plaintiff in said ground), and who then claimed and held said property under a title adverse to that of said Mahan, to wit, under the location of the Caledonia lode described in the complaint.

And plaintiff further avers that if any pretended deed, conveyance, or grant of any right, title, or interest in or to said alleged Bobtail lode was ever made or delivered by said Chizum to said Mahan the same was and is void, in that at the time of the making and delivery thereof the mining ground in controversy in this action was in the actual possession of Michael Heffron, Robert Curlin, James Manning, and Michael Lynch, and their grantees
46 (all of whom are the grantors and predecessors in interest of plaintiff in said ground), and who then claimed and held said grant under a title adverse to that of said Chizum, to wit, under the location of the Caledonia lode described in the complaint.

And plaintiff further avers that said Chizum had, long before the time when he pretended to make any conveyance to said Mahan of his interest in said alleged Bobtail lead, to wit, about the month of June, 1877, abandoned all of his (said Chizum's) title, right, and claim in and to said alleged Bobtail lead.

And plaintiff further avers that said Chizum had, prior to the time when he pretended to make any conveyance to said Mahan of his interest in said alleged Bobtail lead, forfeited all of his interest therein and right thereto by failing to do and perform upon said alleged lode labor or improvements of the value of one hundred dollars in each year after the date of the alleged location thereof, as required by the laws of the United States and of Dakota Territory, in that said Chizum or his co-owners did not during the year from the 24th day of February, 1876, to the 24th day of February, 1877, nor during the year from the 24th day of February, 1877, to the 24th day of February, 1878, perform labor or make improvements upon said alleged Bobtail lead of the value of one hundred dollars, and did not resume work thereon before the making of any conveyance of his interest by said Chizum.

And plaintiff further avers that defendant in his application for patent from the United States, as stated in the complaint, claimed

to be, and made oath that he was, the owner of the whole of the alleged Bobtail—; that upon the adverse claim of plaintiffs, grant-
47 ors to said application, this action was brought, as is set forth in said complaint, and that by reason of the premises plaintiff has been mislead to believe that defendant was the sole claimant of the ground in controversy in this action, and will be delayed and injured if defendant is now allowed to show to the contrary, and that defendant, by his acts in the premises, is stopped from pleading or claiming any non-joinder of defendants herein.

3d. And plaintiff, further replying to that portion of defendant's answer which sets up an alleged defense and counter-claim, and is marked 6, denies that on the 16th day of June, 1876, or at any other time, the former plaintiffs herein, Michael Heffron, Robert Curlin, James Manning, and one Michael Lynch, or any of them, went upon or within the lines of the alleged Bobtail lead, or pretended to make a discovery of gold-bearing ore thereon, or by virtue of any pretended discovery proceeded to make a location of any quartz mining claim there, or any location which embraced three and $\frac{57}{100}$ acres, or any other portion or part of the alleged Bobtail lead; and plaintiff denies that the diagram and map attached to and made part of defendant's answer shows correctly the ground in controversy in this action, or anything else that it purports to show or set out.

Plaintiff avers that said Caledonia lode was duly discovered, located, and claimed, as set out in the complaint herein, and denies that said Caledonia lode location was made within the surface boundaries of any prior or valid location of the alleged Bobtail lead, or that it was or is an invalid or void location.

4th. And plaintiff, further replying to that portion of defendant's answer which sets up an alleged defense and counter-claim,
48 and is marked 7, denies that at any time defendant and said Thomas F. Mahan were, or ever have been, or are now, the owners of the alleged Bobtail lead, or any part thereof, as the same is described and set out by courses in said answer or otherwise.

Plaintiff denies that it ever entered upon any part of the alleged Bobtail lead, or ever mined or extracted or removed or converted to its own use any valuable or other gold-bearing or other ore from said alleged Bobtail lead, or any part of it, or which was or is the property of defendant and Thomas F. Mahan, or either of them, to the injury or damage of defendant and said Mahan, or either of them, in the full sum of one hundred thousand dollars, or in any other sum.

Plaintiff avers that it has entered upon and mined and extracted ore from the ground in controversy in this action, as it had good right to do, and that it has mined and worked from said ground in dispute about ten thousand tones of ore of the gross value of between four and five dollars per ton, but that after deducting the expenses of mining, extracting, transporting, crushing, and working said ore there were no net profits therefrom, and plaintiff denies that defendant and said Mahan, or either of them, have been damaged by any act of plaintiff in any sum whatever.

5th. And plaintiff, further replying to said answer, and for a separate

defense, avers that about the month of June, 1877, said D. G. Chizum abandoned all of his right, title, and interest and claim in or to the alleged Bobtail —; that at the time of said abandonment the said Michael Heffron, Robert Curlin, James Manning, and Michael Lynch and their grantees (who are all the grantors and predecessors in interest of plaintiff in the ground in contro-
49 versy herein) were, and for [a] long time before had been, in the actual and exclusive possession of the mining ground in controversy on this action, claiming title thereto adverse to said Chizum under the said Caledonia location mentioned in the complaint, and that afterwards, to wit, on the 2d day of March, 1878, the said parties and their grantees, who were then the owners and in the actual possession of said Caledonia lode, duly relocated the same, and on the same day caused a certificate of such relocation to be recorded in the office of the register of deeds of said Lawrence county, Dakota Territory.

6th. And plaintiff, further replying to the said answer of defendant, and for a further and separate defense thereto, avers that about the month of September, 1876, the said H. S. Ireton abandoned all of the right, title, and interest which he had or claimed in or to said alleged Bobtail lead; that at the time of said abandonment the said Michael Heffron, Robert Curlin, James Manning, and Michael Lynch and their grantees (who are all the grantees and predecessors in interest of plaintiff in the ground in controversy herein) were, and for a long time before had been, in the exclusive and actual possession of the mining ground in controversy in this action, claiming title thereto adverse to said Ireton under the Caledonia location mentioned in the complaint, and that afterwards, to wit, on the 15th day of March, 1877, the said parties and their grantees, who were then the owners and in the actual possession of said Caledonia lode claim, duly relocated the same on the —day of April, A. D. 1877, [and] caused a certificate of such relocation to be duly recorded in the office of the register of deeds of said Lawrence county, Dakota Territory.

50 7th. And plaintiff, further replying to said answer of defendant, and for a further and separate defense thereto, avers that any and all right, title, or interest which the said H. S. Ireton or the said D. G. Chizum or the said Thomas F. Mahan or the defendant herein, or all or any of them, ever had or acquired at any time in or to the alleged Bobtail lead, or any part thereof, was forfeited and lost by the failure of said parties and each of them to comply with the laws of the United States and the Territory of Dakota regulating and prescribing the amount of work required to be done to hold a quartz mining claim, in that the said Ireton, Chizum, Mahan and defendant did not, nor did any or either of them, or any one for them, perform one hundred dollars' worth of labor or make one hundred dollars' worth of improvements on said alleged Bobtail lead within or during one year after the alleged date of the discovery and location of said alleged Bobtail lead, and that after the expiration of said year, and before said parties or any of them had resumed work on said lead after said failure, the grantors of plaintiff in the ground herein in controversy, to wit, Michael Heffron, Michael Lynch,

Robert Curlin, and James Manning, and their grantees, duly claimed and relocated the said Caledonia lode, including the ground herein in controversy, on the 15th day of March, A. D. 1877, and caused a certificate of such claim and location to be recorded in the mining records of Whitewood quartz mining district, and also on the — day of April, 1877, in the office of the register of deeds of said Lawrence county, Dakota Territory, as is set forth in the complaint herein, and became, and they and their grantees have ever since been and are now the owners and in the actual possession of said Caledonia lode.

51 8th. And plaintiff, further replying to said answer of defendant, and for a further and separate defense thereto, avers that any and all right, title, and interest which the said H. S. Ireton, or the said D. G. Chizum, or the said Thomas F. Mahan, or the defendant herein, or all or any of them, ever had or acquired at any time in or to the alleged Bobtail lead, or any part thereof, was forfeited and lost by the failure of said parties and each of them to comply with the laws of the United States and the Territory of Dakota regulating and prescribing the amount of work required to be done to hold quartz mining claims, in that the said Ireton, Chizum, Mahan, and defendant did not, nor did any or either of them, or any one for them, perform one hundred dollars' worth of labor or make one hundred dollars' worth of improvements on said alleged Bobtail lead within or during the year commencing one year after the date of the alleged location thereof, and ending two years after the date of said alleged location, to wit, during the second year after the date of said location, and that, after such failure, and before said parties, or any of them, had resumed work on said alleged Bobtail lead, to wit, on the 2d day of March, 1878, the grantors of plaintiff of the ground herein in controversy, to wit, Michael Heffron, Robert Curlin, James Manning, and their grantees, duly claimed and relocated the said Caledonia lode, including the ground herein in controversy, and on the same day caused certificate of each relocation to be recorded in the office of the register of deeds of said Lawrence county, Dakota Territory, and they and their grantees have ever since been and are now the owners and in the actual possession of said Caledonia lode and of the ground herein in controversy.

52 9th. And plaintiff, further replying to said answer of defendant, and for a further and separate defense thereto, avers that any deed, conv*a*yance, or grant of any title or interest of, in, or to said alleged Bobtail lead which was or has been at any time made or delivered by the said H. S. Ireton or by the said D. G. Chizum, or either of them, to the said Thomas F. Mahan, or by the said Mahan to the defendant herein, was and is void in that at the time of the making an*y* delivery of each and all of such deeds, conveyances, and grants the mining ground herein in controversy was in the actual possession of the grantors of plaintiffs, to wit, Michael Heffron, Robert Curlin, James Manning, and Michael Lynch, and their grantees, who then claimed and held said mining ground under a title adverse to said Ireton, Chizum, Mahan, and defendant, and all and each of

them, to wit, under the location of the Caledonia lode, as stated in the complaint herein.

10th. And plaintiff, further replying to defendant's said answer, and for a further and separate defense thereto, avers that the grantors and predecessors of plaintiff in the Caledonia lode were, on the 28th day of February, A. D. 1877, and on the 1st day of March, 1877, and continuously thereafter in the actual possession of the said Caledonia lode, including the ground in controversy in this action, with boundaries clearly marked and defined, and in accordance with the laws of the United States and the Territory of Dakota *of Dakota*, and claiming the title hereto and right of possession thereof adversely to any right or title under the alleged Bobtail lead location, and adversely to said Carey, Chizum, Ireton, Mahan, and defendant, and each of them, and all other persons, and they and this plaintiff (their grantee) have ever since been and are now in actual
53 and adverse possession of said mining ground, claiming title thereto.

Plaintiff having fully replied asks decree and relief, as in its complaint herein.

JOHN M. MURPHY AND
CLAGETT & DIXON,
Att'ys for Pl'ff.

TERRITORY OF DAKOTA, } ss:
County of Lawrence, }

A. J. Rigby, being duly sworn, says that he is an officer and superintendent and general agent in said Territory of the Caledonia Gold Mining Company, and has charge and management of the business of said company in said Territory; that he has heard read the foregoing replication and that the same is true to the knowledge of affiant except as to those matters stated on information and belief, and as to those matters that he believes it to be true.

ADONIRAM J. RIGBY.

Subscribed and sworn to before me this 2d day of February, A. D. 1880.

[SEAL.] HARRY B. HALL,
Notary Public.

54 (And appears also thereon the following endorsements and filings, to wit:)

Service of within replication by copy accepted *by copy* this 2d day of February, A. D. 1880, at Deadwood, D. T. McLaughlin & Steele, att'ys for def't. Filed Feb'y 2d, 1880. A. R. Z. Dawson, clerk.

55 And the following entry appears on the minutes of this court under date of July 15th, 1880, on page 316 of journal No. 1 of said court.

CALEDONIA GOLD MINING CO. *vs.* JOHN NOONAN.

Now, on this 15th day of July, A. D. 1880, the trial of this cause is resumed. By consent of all parties Thomas F. Mahan is made a

party defendant in this action. Counsel for defendant appear and answer instanter for him any amendments to pleadings requ. ed to be prepared and served during the pending of this action or at its conclusion.

56 In the District Court, First Judicial District, Lawrence County, Dakota Territory.

CALEDONIA GOLD MINING COMPANY (Formerly Henry Lackey *et al.*), Plaintiff,

vs.

JOHN NOONAN and THOMAS F. MAHAN, Defendants.

Now comes the above-named plaintiff, and in pursuance and by authority of the court hereinbefore made, on the 15th day of July, 1880, making the said Thomas F. Mahan a defendant in this action, amends its amended and substitute complaint, which was herein filed November 6th, 1879, by inserting therein the name of the said Thomas F. Mahan as a defendant, and by inserting in and adding to said complaint, immediately after the subdivision thereof numbered 9, and before the prayer thereof, the following allegation, to wit:

10. And plaintiff further avers that the defendant, Thomas F. Mahan, has, or claims to have, some right, title, or interest adverse to plaintiff in or to that portion of the said Caledonia lode claim above described by survey; that said claim of said defendant Mahan is without foundation or right as against plaintiff, but said Mahan persists in the same and makes said claim, as plaintiff is
57 informed and believes, under the said alleged and pretended location of the said alleged Bobtail lode claim above described as co-owner with, and claiming under the same right as, defendant Noonan, as above mentioned, and that said claim of said Mahan casts a cloud upon plaintiff's title to its said portion of said Caledonia lode above described, and plaintiff therefore makes said Mahan a defendant in this action, and asks the same judgment, decree, and relief against him as hereinafter prayed against said defendant Noonan.

CLAGETT & DIXON,
Att'ys for Pl't'ff.

(And appears also the following endorsements, filing, etc., thereon:) Amendment of complaint. Acknowledgement of service this 14th day of December, 1880. McLaughlin & Steele, attorneys for def'ts. Filed December, 14th, 1880. Frank J. Washabaugh, clerk.

58 In District Court, First Judicial District, Lawrence County, Dakota Territory.

CALEDONIA GOLD MINING COMPANY (Formerly Henry Lackey *et al.*),

vs.

JOHN NOONAN and THOMAS F. MAHAN.

In this action a trial by jury as to those issues triable by a jury having been waived by consent of parties in open court, entered

upon the minutes, and the action and the questions of fact therein having been tried by the court, and the court having heard the evidence and argument, and being fully advised in the premises, finds the facts to be as follows, to wit:

59 *Findings of Fact.*

In the District Court, First Judicial District, Lawrence County, Dakota Territory.

CALEDONIA GOLD MINING COMPANY (Formerly Henry Lacke) *et al.*, Plaintiff,

vs.

JOHN NOONAN and THOMAS F. MAHAN, Defendants.

I.

That the plaintiff in this action, the Caledonia Gold Mining Company, is now and has been since the month of September, A. D. 1878, a corporation organized and existing under and by virtue of the laws of the State of California, and carrying on the business of mining in the county of Lawrence and Territory of Dakota, and has complied with the laws of Dakota Territory, and is and has been since said month of September, 1878, authorized to transact business, purchase and hold property, both real and personal, and maintain suits in said Territory.

60 II.

That the property and mining claims in controversy in this action are situated in Whitewood quartz mining district (called Lost district in the early part of 1876), Lawrence county, Dakota Territory.

III.

That on the 30th day of December, A. D. 1876, the miners of Whitewood quartz mining district established said district, and adopted rules and regulations, a copy of which is hereto annexed, marked Exhibit "M," and made a part of these findings; and prior to said 30th day of December, 1876, there were no customs, rules, or regulations concerning lode claims in force in the said locality, except a custom of recording such claims in a mining recorder's office, but said custom did not prescribe any time within which said record should be made.

EXHIBIT "M."

Mining Laws.

Laws of Whitewood quartz district. In accordance with a notice published in the Black Hills Pioneer on the 9th day of December, 1876, and with other notices posted in conspicuous places before and after advertising above, of which notice the following is a copy:

61 Notice is hereby given that a meeting of the quartz miners of Whitewood district will be held at Gayville on the 29th

day of December, A. D. 1876, at 2 o'clock p. m., at the house of Thomas Campbell, for the purpose of making local and adopting general laws. It is of vital importance that all those who have any interest in that respect should be present. Whitewood district is that portion of the Black Hills which embraces Whitewood creek and all its tributaries.

T. H. CARR, *Recorder.*

The meeting convened, in pursuance to call of notice, at 2 o'clock p. m., at the house of Thomas Campbell, at Gayville, in the Black Hills, D. T. On motion of T. H. Carr, Mr. D. E. Costigan was elected temporary president of the meeting. On motion of John M. Murphy, Mr. T. H. Carr was elected temporary secretary of said meeting. On motion of S. P. Romans, Mr. D. E. Costigan was chosen permanent president of said meeting, and Mr. T. H. Carr was chosen permanent secretary of said meeting. On motion, carried, that a committee of five be appointed by the president to draft local and to adopt general laws for this district. The committee appointed by the president consisted of the following-named gentlemen present: John M. Murphy, chairman; S. P. Romans, John Bell, Henry Spencer, and George L. Houghton, who were instructed to report at — adjourned meeting, on December 30th, 1876. On motion, carried, that this meeting do now adjourn till the 30th day of December, 1876, at same time and place.

(Signed) D. E. COSTIGAN, *President.*
T. H. CARR, *Secretary.*

62 GAYVILLE, D. T., *Dec.* 30, 1876.

Meeting convened in pursuance of adjournment of December 30th, 1876, and the committee appointed by the president presented their report in writing, and which was thereupon read to the meeting. On motion, the laws formed by the committee became the property of the meeting, and committee be discharged. Carried. On motion, that *that* the laws be read and acted upon by sections. Carried.

Be it enacted by the quartz miners of Whitewood mining district, in mass meeting assembled, December 30th, 1876, the following laws, rules, and regulations governing the locations of quartz claims in said district, to wit:

SEC. 1. Whitewood district shall consist of all that section of country drained by Whitewood creek and tributaries. Carried. The officers of Whitewood district shall consist of a recorder and secretary, the recorder to be *ex-officio* secretary, and shall keep the records of all meetings. Carried.

SEC. 2. We hereby adopt the United States mining laws of May 10th, 1872, with acts — amendments thereto, with the following local rules and requirements. Carried.

SEC. 3. From and after the approval of these laws all citizens of the United States of lawful age, and those who have declared their intentions to become such, under the regulations specified by law, shall have the right to locate claims in Whitewood mining district

upon veins or lodes of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits. Carried.

SEC. 4. A mining claim located after the adoption of these laws, whether located by one or more persons, may equal but shall not exceed 1,500 feet in length along the vein or lode. No claim shall extend more than 150 feet on each side of the middle of the vein at the surface. The end lines of each claim shall be parallel with each other. Carried.

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SEC. 5. In order to entitle any person or persons to record any lead, lode, or leads of quartz claim, either of gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, there shall first be discovered a vein, lode, or mineral deposit lying in place upon the ground claimed; the said claimant or claimants shall place a post or monument at each corner of the land claimed, also a post or monument at each end of the land claimed, marking the centre of the land claimed; also a post or monument at the centre of each side line; also at discovery shaft a stake or board, upon which shall be designated the name of the lode or claim, the name or names of the locators, the number of feet of ground claimed, and in which direction from the point of discovery, and the number of feet claimed on each side of the vein or crevice, and such a description of the claim by reference to some natural object or permanent mound as will identify the claim—such as prominent buttes, the confluence of streams, and other landmarks in the vicinity of the mine. Carried.

SEC. 6. A copy of a location notice of a mining claim, tunnel, site, or mill site shall be handed to the recorder of this district within 20 days from the posting of said notice on the claim, or the location shall be held as abandoned. Carried.

SEC. 7. In order to hold a possessory right to a claim there shall be not less than one hundred dollars' ($100) work done thereon during each year, and in performing such labor 500 cubic feet in picking ground and 125 cubic feet in blasting rock shall be estimated at one hundred dollars. Carried.

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SEC. 8. It shall be the duty of the recorder to call meetings of the quartz miners of this district whenever a petition is handed him signed by ten or more persons ow-ing quartz claims in this district, or the legal representatives of such quartz-claim owners, requesting him to give notice of such meeting, for the purpose of altering or amending the laws of this district, or for the election of a quartz recorder, and such notice shall be posted in at least five conspicuous places in the district for at least ten days previous to the meeting, and it shall be the duty of the recorder to record all location notices upon the payment of his fees. He shall have the right to appoint one or more deputies, and shall be entitled to the following fees for recording quartz claims: Mill sites and tunnel rights, each two dollars; and for deeds, bonds, mortgages, and other instruments of writing, one dollar for each folio and fifty cents for each additional folio, and certified copies of location notices shall be purchased for one dollar each.

(Amendment to section 9.) On motion, that — any meeting here-

after called it shall require a two-thirds majority of the quartz miners present to decide any measure before said meeting. Sec. 9 adopted as amended.

SEC. 9. The district recorder is hereby authorized to administer oaths or affirmations when the mining laws of the United
65 States require the same relative to mining purposes. Carried.

SEC. 10. The present recorder, T. H. Carr, is hereby declared elected recorder for the year ending December 31st, 1877. Carried.

SEC 11. The records are hereby declared to be the property of the district. The recorder shall turn over to his successor in office all books, records, papers, and documents belonging to his office, and in the event of the organization of a county in this district he shall turn over to the recorder of the county all the records of his office, when such county organization is completed. Carried.

Committee: John M. Murphy, chairman; Henry Spencer, S. P. Bomans, John Bell; George L. Houghton, secretary.

We hereby certify that the above laws were adopted by the miners in mass meeting assembled, section by section, December 30, 1876, to take effect from this date.

D. E. COSTIGAN, *President.*
T. H. CARR, *Secretary.*

SEC. 12. At a meeting held by the miners of Whitewood quartz mining district, in Gayville, D. T., on the 6th day of March, A. D. 1877, the following resolutions were adopted, to wit: Resolved, That we, the quartz miners of Whitewood quartz mining district, in mass meeting assembled, re-enact and legalize the laws heretofore passed and adopted in this district, and that Thos. H. Carr, the present recorder, be elected, and is hereby declared recorder of this district for one year from this date.

S. P. ROMANS, *Chairman.*
GEO. L. HOUGHTON, *Secretary.*

66 SEC. 13. At a meeting held by the quartz miners of Whitewood district on the 10th day of May, A. D. 1877, the following resolutions were adopted, to wit:

Be it enacted by the quartz miners of Whitewood quartz mining district, in mass meeting assembled, That the quartz recorder of said district is hereby authorized to turn over all records, laws, papers, and documents belonging to said office to the recorder of deeds of Lawrence county, D. T., within thirty days from date, and the recorder is requested to take receipt for the same when delivered.

May 10th, 1877.

S. P. ROMANS, *Chairman.*
T. H. CARR, *Secretary.*

SEC. 14. T. H. Carr, Esq., SIR: Your petitioners would respectfully ask that a meeting of the quartz miners of Whitewood quartz district be called in conformity with section 9 of the laws of said district, for the purpose of changing a portion of section twelve 12 of

said laws, and for the transaction of such business as may legally come before the meeting.

Gayville, April 30th, 1877.

Signers of the call: W. M. Ball, James Ryan, John Sinclair, H. H. Reed, E. J. Gallagher, M. Goldman, L. P. Elliott, and D. Jones.

In compliance with the foregoing petition the following notice was was given:

May 25th, A. D. 1877.—To all whom it may concern: Notice is hereby given that a meeting of the quartz miners of Whitewood district will be held at the house of Thomas Hanley, in Gayville, on the 8th day of June, A. D. 1877, at 7 o'clock p. m., to trans-
67 act important business relative to the records of Whitewood district.

The meeting convened in pursuance to public notice, and J. H. S. Coleman was elected president and Wm. Lardner secretary. On motion that the following portion of section (12) twelve, to wit, "and in the event of the organization of a county in this district he shall turn over to the recorder of the county all the records of his office when such county organization is completed," and the whole of section fourteen*th* (14) be repealed. Carried unanimously.

J. H. S. COLEMAN, *Chairman.*
WM. LARDNER, *Secretary.*

Notice is hereby given that a meeting of the miners of Whitewood quartz mining district will be held in the house of Thomas Campbell, of Gayville, on the 7th day of September, 1877, at 7 o'clock p. m., for the purpose of electing a recorder to fill the vacancy caused by the death of the late recorder, Thos. H. Carr, who was killed by the Indians August 27th, A. D. 1877.

J. B. CARR.

Meeting convened in pursuance to call of notice, and adjourned to the office of the deputy recorder, on placer claim No. 4 of Deadwood gulch, above Discovery.

On motion, J. B. Carr be elected recorder of Whitewood district for the year ending March 6th, 1879, or until his successor is duly elected. Carried.

WM. H. BROWN, *Chairman.*
J. B. CARR, *Secretary.*

68 IV.

That on the 14th day of June, A. D. 1876, Michael Heffron, Michael Lynch, Robert Curlin, and James Manning, all being then citizens of the United States, sunk a shaft about seven feet in depth and sufficient to show a well-defined mineral vein or lode on the east side of Shomaker gulch and within the limits of the claim afterwards located by them as the Caledonia quartz lode mining claim, and discovered in said shaft a vein or lode of quartz rock in place bearing valuable deposit of gold; and thereafter, on the 15th day of June, 1876, posted a stake sunk in the ground, on the surface, at said discovery shaft, a plain written notice of their claim and location of a

quartz mining claim, which notice contained the name of the lode, to wit, the Caledonia lode; the names of the locators, to wit, M. Heffron, M. Lynch, B. Curlin, and J. Manning; the date of the location, to wit, June 15th, 1876; the number of feet of ground claimed in length, to wit, fifteen hundred feet, and the number of feet claimed and in what direction from the Discovery shaft, to wit, five hundred feet in a southeasterly direction and one thousand feet in a northwesterly direction from said discovery shaft; the number of feet claimed on each side of the vein or lode, to wit, one hundred and fifty feet on each side, and such a description of the claim by reference to natural objects and permanent monuments as identified the same, to wit, that it was located on the east side of Shoemaker gulch and about eight hundred feet northwest of the Clara mine.

That on the same day, to wit, on the 15th day of June, 1876, the said Heffron, Lynch, Curlin, and Manning named the surface boundaries of said Caledonia mining claim and location, so
69 that the same could be readily traced, by eight substantial posts sunk in the ground and hewed on the sides facing the claim—one at each corner of said claim, one at the centre of each end line, and one at the centre of each side line of said claim, and the end lines of said claim were parallel.

And that on the 21st day of June, A. D. 1876, the said Heffron Lynch, Curlin, and Manning caused to be filed for record in the office of the mining recorder of said Witewood quartz mining district, and to be recorded in the mining records of said district, a certificate or notice of their said location of said Caledonia mining claim, which was a copy of the notice posted by them at the Discovery shaft on said claim, as above mentioned, except that said copy bore the date of June 21st, 1876, instead of June 15th, 1876, as in the notice posted.

A copy of said notice so filed and recorded is attached to and made part of these findings, and marked Exhibit "A."

EXHIBIT "A."

Caledonia Lode.

GAYVILLE, *June* 21, 1876.

This is to certify that we, the undersigned, claim 1,500 feet on this lode or ledge of mineral, known as the Caledonia lode,
dist dist 70 running 500 feet in the southeasterly direction and 1,000 feet and in a northeasterly direction and 1,500 feet on each side of Law crevise for mining purposes, located on the east side of Shoemaker corc gulch and about 800 feet northwest of the Clara mine.

Filed for record June 21st, 1876.

M. HEFFRON.
M. LYNCH.
R. CURLIN.
J. MANNING.

V.

That the said Heffron, Lynch, Carlin, and Manning, after the location by them of the Caledonia mining claim, continued in the

possession thereof, and before the 15th day of February, 1877, performed and caused to be performed upon said claim more than five hundred dollars' worth of work and labor in sinking said discovery shaft and running drifts therefrom.

VI.

That on the 28th day of February and 1st day of March, 1877, all of the posts and monuments marking the surface boundaries of the said Caledonia claim, which had been placed thereon by the locators in June, 1876, remained and were standing in the same places as originally placed except the post marking the south
71 centre end, which had been destroyed or removed in 1876 and a tree or stump near it, afterwards and before the 28th day of February, 1877, adopted and marked by the owners of said claim, at the south side centre end stake, and there was upon said claim and within said boundaries a discovery shaft forty-five feet in depth and within which there was disclosed a well-defined vein or lode of quartz rock in place, bearing valuable deposits of gold, and the notice or certificate of location of said claim, made by the locators in June, 1877, remained and was of record in the mining recorder's — of the said Whitewood quartz mining district; and that on the said 28th day of February and the said 1st day of March, 1877, the surface boundaries of the said Caledonia mining claim were plainly marked, so that the location could be readily traced, by substantial posts sunk in the ground and hewed on the side facing the claim, one at each corner of the claim, one at the centre of each side line, and one at the centre of each end line of said claim, and there was a shaft sunk on said claim, and within said boundaries, sufficient to show a well-defined mineral vein or lode and a discovery of a vein or lode of quartz rock in place bearing valuable deposits of gold was made in said shaft, and a certificate or notice of location of said claim was of record in the mining records of said Whitewood quartz mining district.

VII.

That from the 28th day of February, 1877, until the 15th
72 day of March, 1877, and for some time thereafter, Michael Heffron, Michael Lynch, Robert Curlin, and James Manning, the locators, and Henry Locke, Peter O'Neill, J. M. Murphy, and L. P. Elliott were the owners of the said Caledonia mining claim, and were all citizens of the United States.

VIII.

That on the 28th day of February and the 1st day of March, 1877, the said owners of the Caledonia mining claim were in the actual and exclusive possession of said claim, claiming title thereto against all persons except the Government of the United States, and were by themselves and their employes working upon said claim by running drifts from the Discovery shaft thereon and stopping ore there-

from, and had been continuously so at work since the 15th day of February, 1877, and so continued at work until the 1st day of April, A. D. 1877, and during said time performed and caused to be performed upon said claim more than four hundred dollars' worth of work.

IX.

That on the 28th day of February and the 1st day of March, A. D. 1877, the said owners of the said Caledonia claim, who were then in the actual possession thereof and working thereon, adopted
73 the said posts and monuments then standing, as above mentioned, and marking the boundaries of said claim and the discovery of the vein or lode thereon made, and the Discovery shaft and other work done thereon, and then and thereafter claimed title to said claim as this marked and defined by said posts and monuments, and to said lode thus discovered and under and according to the original notice or certificate of said location then standing on the mining records of said Whitewood quartz mining district.

X.

That on the 15th day of March, A. D. 1877, the then owners of the said Caledonia mining claim who were then in the possession of and working upon the same and had a discovery thereon, and the boundaries marked as above mentioned, made and filed for record in the office of the mining recorder of said Whitewood quartz mining district a copy of the notice or certificate of location of said claim made and recorded by the locators in June, 1876, and a supplementary notice or certificate of location of said Caledonia mining claim, which was afterwards recorded in the records of said mining district, and a copy of which is attached to and made part of this finding and marked Exhibit "B."

EXHIBIT "B."

Caledonia Lode.

GAYVILLE, *June 21st*, 1876.

74 This is to certify that we, the undersigned, claim 1,500 on this lode or ledge of mineral known as the Caledonia lode, running 500 feet in a southeasterly direction, and 1,000 feet in a northwesterly direction, and 150 feet on each side of crevice—mining purposes—located on the east side of Shoemaker gulch, and about 800 feet northwest of the Clara mine.

M. HEFFRON.
M. LYNCH.
R. CURLIN.
J. MANNING.

The undersigned, being desirous to more fully comply with the laws of the United States, do hereby add this supplementary record to the said original location to show present ownership and claim,

and to cover any illegality that might attach to making mining locations upon the Indian reservation.

Now, therefore, Congress having by treaty and purchase recently recorded to citizens of the United States the legal right to locate claims and possess mining ground in this mineral district, the undersigned hereby locate and claim the above mentioned and described mining ground, known as and called the Caledonia lode vein or deposit, under the present existing United States laws and local laws of Whitewood district. Said mine and claim is situated about one mile from Gayville, Lawence county, D. T., and on the east side of Shoemaker gulch, north of Clara Hill.

Claimant claim- fifteen hundred (1,500) feet in length, 150
75 feet on each side of the lode, vein, or crevice, five hundred feet southeasterly from Discovery shaft, and one thousand feet northwesterly from said Discovery shaft.

This location made this 15th day of March, A. D. 1877, at 11 o'clock a. m., and is claimed by Henry Lacke, 250 ft.; Peter O'Neill, 250 ft.; L. P. Elliott, 50 ft.; J. M. Murphy, 50 ft.; M. Heffron, 250 ft.; M. Lynch, 250 ft.; R. Curlin, 250 ft.; J. Manning, 150 ft.

XI.

That on the 16th day of March, 1877, the said owners of the said Caledonia mining claim posted on a tree, about four feet from the Discovery shaft, on said claim, a written copy of the said original and supplementary notices of location so made and filed by them in the mining recorder's office on the 15th day of March, 1877, as above stated.

XII.

That on the 25th day of April, A. D. 1877, and within a reasonable time after the office of the register of deeds of Lawrence county,
Dakota Territory, was opened for the transaction of business,
76 the said owners of the said Caledonia mining claim caused to be filed and recorded in the office of the said register of deeds of Lawrence Co., D. T., a paper which was in all respects a copy of the one filed by them in the miners' recorder's office on the 15th day of March, 1877, as above stated, except that by a mistake the one filed in the register's office designated the number of feet in the claim owned [by] the said Murphy, Elliott, and Manning as 250 feet each instead of 50 feet each for said Murphy and Elliott and 150 feet for said Manning, as it should have been and as it was in the original notice or certificate and the record thereof in the mining recorder's office, and that on the 27th day of September, 1877, the then owners of the said Caledonia mining claim to correct said error filed and had recorded in said register of deeds' office a supplementary notice to correct said error, a copy of which is attached to and made part of this finding and marked Exhibit "C."

EXHIBIT "C."

CALEDODIA LODE [*vs.*] HEFFRON, LYNCH *et al.*

Filed at 10.15 a. m., Sept. 27th, 1877.

Supplement.

Caledonia Lode.

77 This supplementary record [is] made to correct error in the number of feet due each owner as follows, to wit:

Henry Lacke, 250 feet; Peter O'Neill, 250 feet; L. P. Elliott, 50 feet; J. M. Murphy, 50 feet; M. Heffron, 250 feet; M. Lynch, 250 feet; R. Curlin, 250 feet; J. Manning, 150 feet.

This supplementary record is made to correct error in record filed this 25th day of April, A. D. 1877, and recorded in vol. "A" of location certificates on page- 41, 42, and 43, the foregoing being the true number of feet each was entitled to at the date of said record, the error having been made in copying *in copying* the original record from the local records of Whitewood mining district.

XIII.

That in November, 1877, the owners of the said Caledonia mining claim caused a survey thereof to be made by Smith & Ankeny, surveyors; that said survey established the lines of said claim as the same is claimed by plaintiff in this action, and that the lines of said survey are the same as those of the original location and those marked on the ground by posts on the 28th day of February and the 1st day of March, 1877, except that on said survey the north end line of the claim was changed in direction and one cor-
78 ner swung upon the claim and the other out off of the claim about forty feet, but said change did not in any way affect the ground in controversy in this action; and, further, that on said survey the stump or tree which had been adopted by the locators of the Caledonia in 1876 as to south center and stake was found to be about twenty feet too far to the south to be in line with the corner stakes on the south end, and the south line of the survey left said stump about that distance to the south.

XIV.

That on the 2d day of March, 1878, the then owners of the said Caledonia mining claim, who were then in the possession thereof, caused to be made and posted on a tree near the Discovery shaft on said claim a notice or certificate of location of said claim, a copy of which is attached to and made part of this finding and marked Exhibit "D," and afterward, on the said 2d day of March, 1878, caused a copy of said notice or certificate to be filed and recorded in the office of the register of deeds of Lawrence county, Dakota Territory.

EXHIBIT "D."

TERRITORY OF DAKOTA, } ss:
Lawrence County, }

Known all men by these present that the undersigned, having complied with the local laws, customs, and regulations, and
79 the mining act of Congress of May 10th, 1872, have located 1,500 feet linear and horizontal measurement on the Caledonia lode along the vein thereof, with all its dips, spars, veins, lodes, and ledges, with 150 feet on each side of the middle of said vein at the surface, with the surface ground within the lines of said claim, 500 feet on said lode running southeasterly from the centre of Discovery shaft, and 1,000 feet running northwesterly from the centre of said Discovery shaft, situated on the east side of Shoemaker gulch and south side of Bobtail gulch, about 1,500 feet from its confluence with Deadwood creek, and about 2,000 feet south of Central city, in Whitewood quartz mining district, Lawrence county, Dakota Territory, described more particularly by field-notes of survey as follows, to wit: Commencing at a stake for corner No. 1, being the S. E. corner from which the N. W. corner stake of Minnie Tunnel site b'rs No. 32° 30′ W., and Mammoth Tunnel site b'rs No. 50° 45′ W., and prominent mountain peak b'rs 50° 15′ E. (var. 15° 30′ E.), and prominent mountain peak b'rs S. 72° 45′ W.; thence No. 1° 40′ W. 500 feet to a stake for corner No. 2; thence No. 16° 30′ W. 1,000 feet to a stake for corner No. 3, from which dead pine tree 14 inches b'rs No. 21- E. 26 feet, and pine tree 10 inches S. 55° W., and prominent mountain peak b'rs No. 0°, 30′ W.; thence No. 10° E. and prominent mountain peak b'rs S. 88° 20′ W. 300 feet to a stake for corner No. 4; thence 16° 30′ E. 1,000 feet to a stake for corner No. 5; thence S. 1° 40′ E., 500 feet to a stake for corner No. 6, from which a pine tree 12 inches b'rs No. 33° 30′ E. 23 feet, and a pine tree 12 inches b'rs S. 90° 30′ W. 22 feet and a prominent mountain
80 peak b'rs N. 2- W., and a ledge of rocks in place bears N. 73° 30′ E.; thence N. 88° 20′ E. 300 feet to the place of beginning. Mines in the vicinity: Clara No-. 1 and 2; Queen of *of* the West; Goldfinch, and High Lode. Field-notes of survey in the office of Smith & Ankeny, Deadwood, for further reference.

This location is made as a relocation of said Caledonia lode and of the boundaries established by a survey of the same made by Smith & Ankeny on Nov. 14th, 1877, which said survey established the lines of said lode as above described, and which said lines were the same as when said claim was first located and as the same has been claimed and possessed by the owners of said lode ever since.

This location is a new location without waiving any rights under previous locations or possessing rights of said lode, and is made by the undersigned for their benefit in the proportions in which they own their respective interests in said Caledonia mine at the date hereof, the undersigned being the present owners thereof.

This claim was first located June 15th, 1876.

Date of the present location, March 2d, 1876.

Whitewood Mining District, Lawrence Co., D. T.

JAMES LYNCH.
MICHAEL HEFFRON.
HENRY LAKE.
ROBERT CURLIN.
PETER O'NEILL.
JAMES MANNING.
JOHN M. MURPHY.
LEWIS P. ELLIOTT.
JOHN MORROW.

81 XV.

That the locators and owners of the said Caledonia mining claim performed more than one thousand dollars' worth of work upon said claim within one year next after the 15th day of June, 1876, and more than one thousand dollars' worth of additional work upon said claim within one year next after the 15th day of June, 1877, and more than 2,000 dollars of additional work upon said claim after the 15th day of June, 1878, and before they sold to Thomas Bell in August, 1878.

XVI.

That the locators and owners of the said Caledonia mining claim performed more than one thousand dollars' worth of work upon said claim within one year next after the 28th day of February, 1877, and more than one thousand dollars' worth of additional work upon said claim after the 28th day of February, 1878, and before they sold to Thomas Bell in August, 1878.

XVII.

That from and after the 28th day of February, 1877, and until they sold to Thomas Bell in August, 1878, the locators and owners of the said Caledonia mining claim were in possession of said claim and of the ground in controversy in this action, and during said time worked upon said claim and ground almost continu-
82 ously and performed work thereon in running drift and tunnels of the value of more than 2,000 dollars, and that they were in the actual possession of said claim and ground in controversy at the time of the commencement of this action.

XVIII.

That on the 30th day of August, 1878, the said James Manning, Robert Curlin, Michael Heffron, Peter O'Neill, Henry Lake, James Lynch, John M. Murphy, and Lewis P. Elliott and John Morrow, who were then in possession of said Caledonia mining claim, sold and conveyed the same by deed to Thomas Bell, and on the 17th day of September, 1878, the said Thomas Bell, who was then in possession of said Caledonia mining claim, conveyed the same by deed to the Caledonia Golding Mining Company, the present plaintiff

herein, and afterwards, on the 10th day of December, 1878, said Bell made another convayance of said property to the said Caledonia Gold Mining Company, and that (by admission of record by the parties to this action) whatever title was acquired by the original or subsequent locators of the Caledonia mining claim, if any, to the property in controversy in this action has come by regular transfers to the plaintiff in this action.

XIX.

The the said Caledonia Gold Mining Company is now and has been ever since the convayance to it by said Thomas Bell
83 above mentioned in the possession of the said Caledonia mining claim and *and* of the property herein in controversy, and has continuo-sly worked and mined the same, and expended in work and improvements thereon more than ten thousand dollars, and has performed within each year since the 28th day of February, 1878, and each year since the 15th of June, 1878, much more than one hundred dollars' worth of work upon said claim.

XX.

That about the 24th day of February, 1876, Henry S. Ireton, Thomas E. Carey, and Daniel D. Chezum, then being citizens of the United States, dug a hole about four feet deep and about six feet long (which was afterwards claimed as the Discovery shaft of the Bobtail mining claim), at a point on the east side of Shoemaker gulch, about seven hundred feet distant in a southerly direction from where the Caledonia discovery shaft hereinbefore mentioned was afterwards sunk, and found therein some quartz rock, and on the 24th day of February, 1876, posted on a tree a short distance from said hole a written notice, a copy of which is attached to and made part of this finding and marked Exhibit "E," and on the same day they caused a copy of said notice to be filed in the office of the mining recorder of Lost district (afterwards Whitewood quartz mining district) and recorded in the mining records of said district.

84 EXHIBIT "E."

BLACKTAIL, *Feb'y 24th*, 1876.

Bobtail lead, situated on the left-hand fork of Bobtail gulch, Lost district, commencing at the northeast end of Gold Run lead, running 1,500 feet northeasterly course from the place of beginning. Discovered Feb'y 21st, 1876; located Feb. 24, 1876, by H. S. Ireton, T. E. Carey, D. G. Chizum.

XXI.

That on the said 24th day of February, 1876, the said Ireton, Carey, and Chizum placed a post or stake at each corner of the said Bobtail lode as claimed by them and a post or stake at the centre of each line, but placed no posts at the centre of or on the side lines of said claim.

XXII.

That the posts or stakes so placed by the said Ireton, Carey, and Chizum marking the southwesterly end line of the said Bobtail claim were respectively within a few feet of the corresponding stakes then marking the northeasterly end line of the Gold Run
85 claim, and the line so marked by said stakes as the southwesterly end of the Bobtail claim was almost three hundred and ninety feet south of the hole claimed as the discovery shaft of the Bobtail claim and three hundred and twenty-eight feet south of the line now claimed by defendants as the south end line of said Bobtail claim.

That said Ireton, Carey, and Chizum, in making said Bobtail location, intended to locate and appropriate six hundred feet in width or three hundred feet on each side of their alleged discovery shaft, and measured their said claim of said width, and placed the posts marking the corners of said claim both on the north end and the south end six hundred feet apart, so that said claim as marked by said posts was six hundred feet in width and fifteen hundred feet in length, commencing at the northeast end line of the Gold Run claim about three hundred and ninety feet south of the discovery shaft of the Bobtail mining claim in a northeasterly direction.

XXIII.

That the map or diagram hereto attached and made part of this finding and marked Exhibit "F," and which is a copy on a smaller scale of the map put in evidence by the plaintiff upon the trial of this action, correctly represents and shows as therein designated and marked the said Caledonia mining claim as the same was located and is now claimed, the discovery shaft thereon, the northeast end line of the Gold Run claim as the same was claimed and
86 marked by posts in February, 1876, the discovery shaft on the said Bobtail claim, and the other claims, boundaries, and points marked on said map; that the blue dotted lines on said map show correctly the boundarey of the said Bobtail claim, as the same were marked by posts and claimed by said Ireton, Carey, and Chizum on the 24th day of February, 1876, and the continuous blue line within said dotted blue line shows correctly three hundred feet in width out of the centre of said Bobtail claim as originally located and claimed; and the red line on said map show correctly the said Bobtail claim as the same is now claimed by defendants; and said map also correctly shows the conflict between the Caledonia claim and the Bobtail claim and the ground in controversy in this action and the relative positions of the claims and points thereon designated.

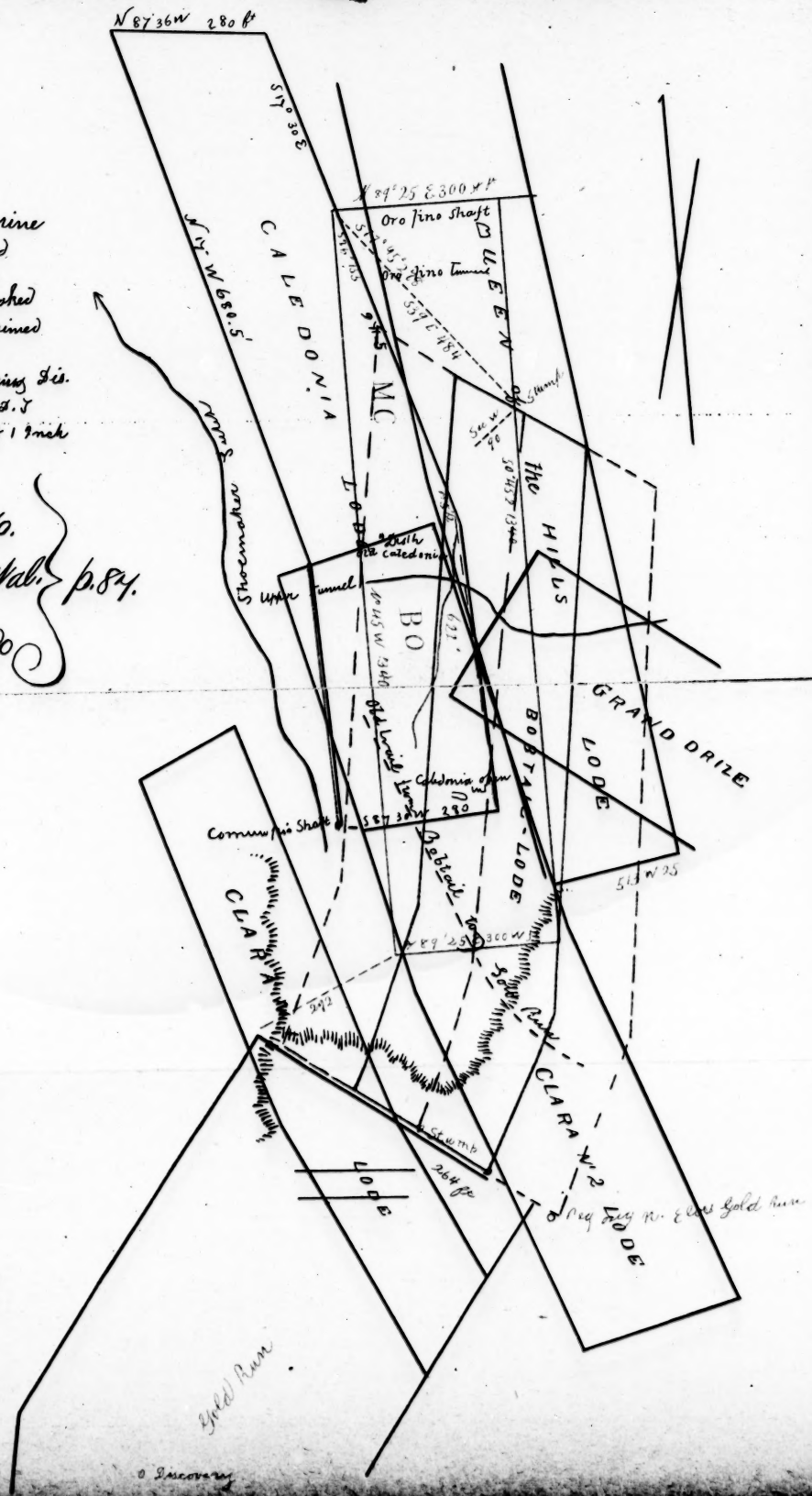
(Here follows diagram marked p. 87.)

XXIV.

That the said Ireton, Carey, and Chizum did discover *of* find within the limits of said Bobtail mining claim a vein or lode of rock

Map
showing
Caledonia mine
and the pretended
Bobtail claim
as orginally staked
and as now claimed
represents
Whitemore Mining Dis.
Lawrence Co. D.T.
Scale 200 ft to 1 inch

No. 170.
Noonan et al. } p. 84.
v.
C Gm Co



in place bearing gold, as said Bobtail claim was originally located and claimed by the locators on the 24th day of February, 1876.

XXV.

That in the month of March, 1876, the said Thomas E.
88 Carey exchanged and conveyed his interest in the said Bobtail mining claim to the said Henry S. Ireton and Daniel G. Chizum.

XXVI.

That the locators and owners of the said Bobtail mining claim did not themselves within one year next after the 24th day of February, 1876, perform one hundred dollars' worth of labor or make one hundred dollars' worth of improvements upon said claim, and that they did perform within said year, in the month of February, 1876, fifteen dollars' worth of labor, and no more, upon said claim, and that they did not resume work thereon after the 24th day of February, 1877, and before the 25th day of March, 1877; that in the month of April, 1876, Bayburg and Coleman did $100 worth of work on said claim under a contract with Ireton and Chizum, by which, for the consideration of said work and other work not performed, said Ireton and Chizum *was* to convey to them an interest in said claim, but which agreement never was carried out, as said Bayburg & Coleman declined to take a deed on the ground [that] the location was of no value in their opinion.

XXVII.

That after the location of the said Bobtail mining claim, and before the 5th day of June, 1876, both the said Henry S. Ireton and the said Daniel G. Chizum abandoned all of their interest in and to the said Bobtail mining claim.

89 XXVIII.

That on the 28th day of February and the first day of March, 1877, and thereafter until after the month of April, 1877, there were no posts or stakes marking the boundaries or corners of the said Bobtail mining claim, either as the same was originally located or as it is now claimed by defendants, or at all.

XXIX.

That on the 28th day of February and 1st day of March, 1877, and thereafter prior to the 25th day of March, 1877, neither the said Ireton -or Chizum, nor any other person claiming under them or otherwise any right in or interest to said Bobtail mining claim, was in the actual or other possession of said claim.

XXX.

That on the 25th day of March, 1877, the said Henry S. Ireton executed and delivered to Thomas F. Mahan, one of the defendants herein, a deed purporting to grant and convey to said Mahan all of

his (said Ireton's) interest in and to said Bobtail mining claim, and also all of Chizum's interest therein, but had no written power of att'y from said Chizum authorizing him thus to convey, and that at time of the delivery of said grant and conveyance to said Mahan so much of the said Bobtail claim as was within the limits of the
90 Caledonia mining claim and all of the ground in controversy in this action was in the actual possession of the owners of the said Caledonia mining claim, the former plaintiff herein, who then held and claimed the same under a title adverse to said Ireton and Chizum, to wit, under the said Caledonia location.

XXXI.

That between the 1st and the 10th days of May, 1877, the said defendant, Thomas F. Mahan, procured from James B. Carr, then deputy mining recorder of said Whitewood quartz mining district, a copy certified by said Carr of the record of the original location of the said Bobtail mining claim made by said Ireton, Carey, and Chizum on the 24th day of February, 1876, in said mining records, and caused to be written, after the certificate of said deputy to said copy of said original notice, a supplementary notice of location of said Bobtail mining claim, and caused the same, on the 10th day of May, 1877, to be filed and recorded in the office of the register of deeds of Lawrence county, Dakota Territory; a copy of which notice is attached to and made part of this finding, and marked Exhibit "G."

EXHIBIT "G."

BLACKTAIL, *Feb'y 24th*, 1876.

Bobtail leads, situated on the left-hand fork of Bobtail gulch, Lost district, commencing at the north end of Gold Run lead, and
91 running 1,500 feet northeasterly direction from the place of beginning.

Discovered Feb. 21st, 1876; located Feb. 24, 1876, by H. S. Ireton, T. E. Carey, D. T. Chinzum.

I hereby certify that the above is a true and correct copy of the original location notice of the Bobtail lead as said original appears of record in book 1, page 2, of the records of Whitewood mining district, Gayville, D. T.

T. H. CARR, *Recorder*,
By J. B. CARR, *Deputy*.

The undersigned, being more desirous to more fully comply with the requirements of the laws of the United States, do hereby file this supplementary record to the said original notice of location to show present ownership and claim and to cover any illegality that might attach to making mining locations upon an Indian reservation.

Now, therefore, I, the undersigned, not waving any rights had by location, — said above-mentioned claim, known as the Bobtail lode. Said lead is situated on the left-hand fork of Bobtail gulch. Now, commencing at Discovery shaft, I claim 500 feet in a northeasterly

direction; we also claim 150 feet on each side of Discovery shaft as said claim was staked on the 24th day of February, 1876.

I also claim all the rights and privileges guaranteed by the laws of the United States, Territory of Dakota, and local laws and customs of Whitewood district.

THOMAS F. MAHAN.

92 XXXII.

That on the 14th day of October, 1878, the said Daniel G. Chizum executed and delivered to Thomas F. Mahan, one of the defendants in this action, a deed purporting to convey to said Mahan all of his (said Chizum's) interest in and to said Bobtail mining claim, and that at the time of the delivery of said grant and conveyance to said Mahan so much of the said Bobtail claim as was within the limits of the Caledonia mining claim and all of the ground in controversy in this action was in the actual possession of the owners of the said Caledonia mining claim, the former plaintiffs herein, who then held and claimed the same under a title adverse to said Chizum, to wit, under the said Caledonia location.

XXXIII.

That neither the said Ireton nor the said Chizum nor the said Mahan or Noonan, defendants herein, nor any other person claiming under them, or any of them or otherwise any right in or interest to said Bobtail mining claim, performed one hundred dollars' worth of labor or made one hundred dollars' worth of improvement upon said Bobtail claim within one year next after the 24th day of February, 1877, or within one year next after the 28th day of February, 1877, and had not resumed work thereon after the 24th or the 28th day of February, 1878, and before the 2d day of March, 1878.

93 XXXIV.

That none of the locators, owners, or claimants of the said Bobtail mining claim have ever had any actual possession of or done any work upon any portion of the said Bobtail claim within the lines of said Caledonia mining claim or the property in controversy in this action.

XXXV.

That all of the material allegations of the plaintiffs' amended and substituted complaint herein are true.

And from the foregoing facts the court finds the following

94 *Conclusions of Law:*

I.

That the attempted location of said Bobtail mining claim by Ireton, Carey, and Chizum in February, 1876, was invalid and void, and said parties acquired no right or title to the ground in controversy in this action by said location.

II.

That the location of the Caledonia mining claim by Heffron, Lynch, Curlin, and Manning in June, 1876, was regular and valid, except as it was affected by being situated upon the Sioux Indian reservation, and prior in time and superior in right to the said attempted location of said Bobtail claim by said Ireton, Carey, and Chizum.

III.

That the first regular and valid location and appropriation of the ground herein in controversy on and after the 28th day of February and the 1st day of March, 1877, was made by Michael Lynch,
95 Michael Heffron, Robert Curlin, James Manning, Henry Lacke, Peter O'Neil, John M. Murphy, and Louis P. Elliott by their location of the said Caledonia mining claim, and that their said location was on and after said 28th day of February and 1st day of March, prior in time and paramount in right to any location of said Bobtail mining claim.

IV.

That on the 28th day of February and 1st day of March, 1877, neither the said Ireton -or Chizum or any one claiming under them, or otherwise, had any right or title in or to said Bobtail mining claim.

V.

That *the* reason of the adverse possession of the owners of the Caledonia mining claim at the time the deed of H. S. Ireton to Thomas F. Mahan, of the 25th day of March, 1877, was void so far as it attempted to convey the mining ground herein in controversy, and transferred no title thereto.

VI.

That by reason of the adverse possession of the owners of the
96 Caledonia mining claim at the time the deed of D. G. Chizum to Thomas F. Mahan, of October 14th, 1878, was void, so far as it attempted to convey the ground herein in controversy, and conveyed no title thereto.

VII.

That the former plaintiffs herein were at the time of the commencement of this action, and the present plaintiff is now, the owner and entitled to the possession of all the mining ground in controversy in this action as against the defendants herein.

VIII.

That the plaintiff is entitled to judgment and decree, as prayed in its complaint herein, against defendants, declaring and quieting its title and right of possession to the mining ground in controversy in this action, as described in said complaint by metes and bounds.

It is therefore ordered that judgment and decree for plaintiff and against defendants, as prayed in the complaint herein, be entered, with costs.

G. C. MOODY, *Judge.*

97 (And appears also thereon the following endorsements and filings, to wit:) Findings of facts, &c. Due service of within by copy admitted this 7th day of August, 1880. McLaughlin & Steele and Bennett, att'ys for defendants. Filed September 13th, 1880. A. B. Z. Dawson, clerk, by Frank J. Washabaugh, deputy.

98 *Remarks Accompanying the Decision.*

Tried in July, 1880, at the January Term of the District Court.

THE CALEDONIA GOLD MINING COMPANY

v.

JOHN NOONAN and THOMAS F. MAHAN.

Claggett & Dixon, J. M. Murphy, & Henry I. Thornton, for plaintiff; McLaughlin & Steele, Atwood & Bomans, [and] Bennett, for defendant.

MOODY, *Judge:*

I have, with reasonable industry, considered the mass of evidence adduced upon the trial of this action, have found for the plaintiff, and have signed the findings and conclusions mainly as prepared by plaintiff's counsel, but with such modifications as the facts found required.

I have been able to reconcile much of the apparently conflicting testimony, especially that relating to differences in the dates of certain transactions; some I have not been able to reconcile, and, wherever I have not, have endeavored to ascertain where lay the clear preponderance, giving credit to those statements which, all things considered, seemed to be the most reasonable, the most probable, and the best sustained.

99 It is always a disagreeable duty for a judge to find the facts from evidence adduced by witnesses whose statements are in irreconcilable conflict, but, nevertheless, being a duty, it is to be performed, and parties must be content if the trier conscientiously exercises his best judgement to ascertain the real truth.

My remarks will be devoted mostly to a consideration of the evidence and the conclusions I have deduced therefrom. The facts ascertained, the law is clear and undisputed. The entire case turns upon the proper answer to the enquiry which is the prior, subsisting valid appropriations, the mining location claimed by the plaintiff, to wit, the Caledonia, or the location claimed by the defendants, the Bobtail.

With the exception of the question which is presented by the facts that these locations were, until the ratification of the Sioux Indians treaty on the 28 day of Feb'y, 1877, situated upon and included within the Indian reservation, I know of no legal proposi-

tion that has been or can be reasonably mooted in the case. That question has been settled by the decision of this court and of the supreme court of the Territory in former adjudications, and
100 is not, so far as this court is concerned, an open one. Without attempting to elaborate or to make the points plain to any one not familiar with the case, I will give some of the reasons for my conclusions regarding the prominent disputed facts.

As is known, the controversy arises over a piece of mining ground somewhat irregular in shape, which is covered by both the Caledonia & Bobtail locations, these claims overlapping each other to the extent of several hundred feet, and which is illustrated by the map incorporated with the findings. The location of the Bobtail as originally constituted was made on the 24 day of February, 1876; that of the Caledonia on the 15 of June, 1876. Of course, if these locations were not affected by the existance of the Sioux Indian reservation and were of equal validity and still subsisting, the Bobtail, being prior in time, would be prior in right.

Without losing sight of the legal status of these and all other similar attempted mining locations by reason of their being situated upon the Indian reservation, I have admitted and considered evidence of facts that transpired and acts that were performed
101 relating to such locations prior to the abrogation and removal of the restriction consequent upon the existence of such reservation. I have done this for two purposes: First, because such evidence tended to show the conditions of the claims on the 28 day of February, 1877, the time when these locations would first have a legal existance—that is, as whether a discovery of a vein had been made as required by law, whether the surface boundaries were distinctly marked so they could be readily traced, &c., &c; and, secondly, because if an appelate court (and this action may go to the Supreme Court of the United States) should hold the locations unaffected by such reservation, the facts to a just determination of the controversy would be in the record, and thus the expense and the delay of a rehearing would be avoided.

I have determined, then, the facts as they appear from the evidence as to the condition of these claims and what steps were taken towards perfecting the locations, both before and after the 28 of February, 1877, and in so doing have passed upon the question of abandonment of the Bobtail by the original locators without, however,
102 ignoring the principle that they could not, strictly speaking, abandon a possessory right or title which they had not acquired and could not legally acquire. The first disputed fact, or rather series of facts, which I will consider relates to the original location of the Bobtail on the 24 of February, 1876. The questions which arise under the evidence relating thereto are—where, with reference to the present situation of the Bobtail, was the original location, and to what extent in width was it claimed and staked. I deem these important enquiries for several reasons.

A proper solution of them will throw much light upon the evidence of subsequent events. Indeed, when the facts are ascertained as to this original location, they may of themselves determine the

priority of rights between these two locations. Confessedly no other marking of the surface boundaries by any one or in any manner was done subsequent to that by the original locators on the 24 of February, 1876, until the survey and staking by Kello in 1877.

The location of the Caledonia became a perfect and com-
103 plete location in March, 1877. It is as necessary to a complete and valid mining location that it should be distinctly marked on the ground so that its boundaries can be readily traced as that any other act should be done; therefore, if it shall appear that the Bobtail location as now claimed was not marked on the ground at all, so that its boundaries could be traced, until the Kello survey in December, 1877—long after the Caledonia location became complete—then this of itself will give to the Caledonia priority. I do not mean to indicate that a substantial compliance with the statute is not sufficient, or that one loses priority who has made the first discovery and then proceeds within a reasonable time thereafter to mark the surface boundaries as against one who makes a subsequent discovery although he first markes the surface boundaries; but the case under consideration is neither one or the other of these. It rests upon the question whether the present Bobtail location ever had its surface boundaries marked at all until the Kello sur-
vey, in December, 1877, when Kello staked it at Mahan's re-
104 quest. To determine the question we must ascertain where the original Bobtail was situated and how its boundaries were marked, and, therefore, as I have stated, this becomes a very important question.

Daniel D. Chizum, Henry S. Ireton, and Thomas E. Carey were the locators of the Bobtail. Within ten days from the day of the location Carey exchanged with his colocators his interest therein for an interest in a placer claim, and from that time ceased to have any interest in the claim. The def't Mahan obtain a transfer of Ireton's interest some time in March, 1877.

No other person whatever had any interest in the claim until after the Kello survey. As I have said, there is no pretense by any one that any but the original stacking on the 24 of February, 1876, as made by Chizum, Ireton, & Carey was ever done until the Kello survey. Chizum, Ireton, & Carey all testify—Chizum positively, and Ireton and Carey from their best recollection—that the claim was staked on the 24 of February, 1876, 600 feet wide, and this is uncontradicted by anybody. Besides, it is corroborated by other wit-
nesses, and by the further facts that it was one of the earliest
105 locations, which were all at that time 600 feet wide; that Chizum had just located the Gold Run lode 600 feet wide; knew there was no distinct rules limiting the width; knew the United States laws authorized it, and was wholly ignorant of the existence of the territorial statute. Therefore it is indisputable that the original surface boundaries were marked with the side lines 600 feet apart, and no other marking was done on that location until the Kello survey, in December, 1877. Surely the setting of corner and side-line stakes 600 feet distant from each other is in no proper sense marking the surface boundaries of a mining location, which cannot

by law exceed 300 feet in width. Possibly this might not [be] a fatal want of compliance with the statute if the end lines were substantially as originally established, and the centre end stakes as fixed by the Kello survey, and as now claimed substantially at the places they were at the time of the location on the 24- of February, 1876;

106 so that by a survey, drawing a line from one center end stake to the other end, measuring 150 feet each side from that line, the position of the claim could be ascertained; but the evidence clearly demonstrates, at least all the positive evidence—such as is to the contrary is mere conjecture—that the original location of the Bobtail was made with the southerly end line immediately adjoining the northerly end line of the Gold Run as it then was, and running in a northeasterly direction, whereas the claim as stated by Kello, and as now claimed, has its southerly end line some 375 feet further north, and its direction is northeasterly, the difference in the end lines and in the position of its centre and stakes being radical and in no sense an unsubstantial difference. This difference will be more clearly demonstrated by an inspection of the plat attached to the findings.

Therefore I have concluded and so find that the defendant's claim, to wit, the present Bobtail location, did not have its surface boundaries marked so that they could be readily traced, or traced at all, until the Kello survey, in December, 1877.

107 In coming to this conclusion I have placed but little stress upon what, at the time of the Kello survey, was claimed by the defendant Mahan as marking the northwest corner of the Bobtail. If there is one thing in the case demonstrated, it is that by no possibility could that tree or stub have constituted the northwest corner of the Bobtail, as it was bounded and marked by the original locators. It is not in position to do so upon any theory advanced by either party, and I have not been informed by any evidence as to when it was marked or adopted as such corner subsequent to such original location until the Kello survey. If any one could have enlightened me as to when this stub was thus marked as the northwest corner of the Bobtail location, it certainly was the defendant Mahan, for he was the only man interested in the Bobtail claim who was upon the ground at all after the spring of 1876, until such Kello survey, and it cannot be presumed that a stranger in interest, without the knowledge of the claimant, would undertake to thus mark it.

108 The next proposition I will consider relates to the abandonment of the Bobtail claim by the original locators. I have found that whatever right of possession they acquired by their acts of location, if any, they wholly abandon- and gave up long anterior to the obtaining of the deeds by the defendant Mahan from Chizum and Ireton. That an owner of a mining location, while his right still rests in mere possession, and depends wholly upon his continued compliance with the laws of the United States, the laws of the State or Territory, and the local laws, rules, and regulations, and before his title has ripened into an equitable or legal one,

by purchase or issuance of the patent, can abandon such possessor's right, I think, admits of no doubt.

A qualified person has license to go upon the public mineral lands belonging to the United States, and, having made a discovery of valuable mineral deposits, there make a location, and thereafter, so long as he complies with the laws, United States and local, and the local rules and regulations, he can maintain his possessory right thereto. He may obtain a title by purchase from the United States, or he may abandon all the rights which this license gives him, or the license may be revoked by the United States and he be ex-
109 cluded from the possession thereof. I see no reason for changing the rule of abandonment under the express license now obtaining from that which obtained under the former implied license, as such implied license was recognized and the rights thereunder acquired enforced by the courts.

Among the facts upon which rests the finding of abandonment are these: It will be remembered Chizum, Ireton, and Carey were the locators of the Bobtail. They did but a trifling amount of labor thereon, not to exceed three days' light work for one man. Finding some indications which, in their opinion, warranted them in so doing, the location was made, as I have indicated. Within about ten days thereafter Carey exchanged with his colocators his interest for a small interest in a placer claim, and there ended his connection with such location. No more work was done or other improvements made by Chizum and Ireton.

In April of that year they agreed with Rayberg and Coleman to convey to them an interest in the claim for a small amount of labor thereon. Rayberg and Coleman performed the labor agreed upon, or the most of it; but, after faithfully and persistently prospecting the material found, concluded it was valueless, communicated
110 their opinion of the value to Chizum and Ireton, and declined to take a conveyance of any interest in the location. From that time Chizum and Ireton seemed not to have had further connection with the claim in any manner except to make conveyance thereto, as hereafter stated. They did not further work thereon, and although they well knew that other parties were making claims to some portion of the ground—indeed, were working at the very point of their discovery—and also learned of the limit put upon the width of quartz locations by the territorial laws, they paid no further attention to the claim, did not change the boundary stakes, and did not maintain those they placed there, nor replaced their discovery notice, which they knew had been thrown down, and in all respects treated the matter as one of total indifference to them. Ireton swears Chizum told him he would have nothing more to do with it, would do no more work thereon, and he, Ireton, might do as he pleased with it. Chizum left the Territory in September, 1876, returned to the vicinity of this claim in 1877, and remained several days, but did not visit it or enquire about it, and in 1878 conveyed his interest to Mahan for the insignificant sum of $25.00. Ireton, in August and September of 1876, stated on more than one
111 occasion that he had abandoned and given up the claim

because he thought it was valueless, and now upon this trial swears that he did wholly abandon it long before he conveyed it to defendant, Mahan and made the deed only at Mahan's solicitation, and under the circumstances I shall hereafter relate. The entire time, labor, and money expended by these parties upon this claim, exclusive of Rayberg and Coleman's, which cost them nothing, was so trifling, probably not exceeding two days of honest hard work; and finding nothing themselves but a boulder of quartz, having so poor a report from Rayberg and Coleman of the value of the ore, are in themselves strong circumstances indicative of the truth of their declaration that they had abandoned and entirely given up all their interest in the claim.

I think, therefore, the conclusion to which I have arrived, that long prior to the conveyances to Mahan the locators of the Bobtail had abandoned any rights they may have acquired by their location is the correct one, and that the defendant Mahan took nothing by such conveyance for this reason.

The remaining matters to which I will refer in these remarks relate to the condition of their locations and the situation of the claimants with reference thereto on and after the 28 day
112 of February, 1877. I have found, I think, upon sufficient evidence, that the owners of the Caledonia were on that day in the actual possession of this location, including the ground in controversy, and they and their grantees have continued such possession ever since.

Now about this Bobtail claim.

It seems that the defendant Mahan, who now seeks to recover the ground in dispute under and by virtue of the Bobtail location, went with certain other parties on the 6th of July, 1876, upon what is now claimed by him as the Bobtail, and in close proximity to the discovery point thereon, and there sunk a shaft, made a location, naming it the Clara No. 2, which last-named location includes a part of the ground now in litigation, as well as all of the Bobtail workings and discovery point, and also including other ground not included in the Bobtail.

Either Mahan and his colocators must at that time have regarded the Bobtail location as abandoned, or else they were guilty in intention [of] wantonly *of* trespassing upon other rights.

Mahan ever since has been and still is an owner in the Clara No. 2, his associates on and for some time after February 28, 1877, being Matthew Moore, William Gunn, and perhaps others.

113 After the Caledonia owners had resumed work upon their location, and some time about the 18th or 20th of March, 1877, Mahan, Gunn, and Moore resumed work upon the Clara No. 2, and while they were there at work they filled up the Bobtail discovery shaft and cut down and put into the dump the tree on which had been written the Bobtail discovery notice. On a day shortly after they had thus resumed work upon the Clara No. 2 some one, whose name I do not now recall, came along and incidentally mentioned the fact of the former Bobtail location, and during a conversation which thereupon ensued between the Clara No. 2 owners as to

the propriety of extinguishing forever any apprehension of trouble from the old Bobtail claim, I think arose in Mahan's mind the thought of purchasing that title. The evidence shows that Gunn was first designated as the one to hunt up and extinguish this title, and after a day of unsuccessful search by him of Ireton, the matter was turned over to Mahan for accomplishment.

The next day Mahan searches for and finds Ireton, takes him to Judge Murphy's office, and then has a deed prepared and executed conveying to himself the whole of the Bobtail claim, instead,
114 as in good faith he should have, had it conveyed to all the owners of the Clara No. 2. This deed from Ireton was antidated at Mahan's request to December 5th, 1876, and expressed a consideration of $1,500 instead of $150, which was the sum agreed to be paid at a future time, but no part of which was paid at the time of executing and delivering the deed. Mahan first tells his co-owners in the Clara that he paid $1,500 for the claim, the amount expressed in the deed, and wants them to refund him their share of this amount, but afterwards admits the agreement to pay only $150, and repeatedly thereafter requests their settlement with him for their share of that amount, thus showing that the intention was simply to extinguish any possible conflicting claim that might arise regarding the Bobtail location for the benefit of the Clara No. 2 owners.

It is true that upon this trial the fact is for the first time urged and for the first time alleged that Mahan purchased the Bobtail title in December, 1876, and took from Ireton at that time a bill of sale therefor in a small memorandum book; but there is no pretense that anything was then paid, and Ireton nowhere alludes to any such transaction, although his evidence is taken on behalf of the
115 defendants; nor does it appear that Mahan ever mentioned it to any one up to the time of this trial, and so important a document is not produced, but claimed in some unknown way to be lost. I think the overwhelming evidence is in favor of the plaintiff's theory, which is also the theory of Mahan's co-owners in the Clara No. 2, that no deed or agreement was ever made for the sale or transfer of the Bobtail to Mahan until after the Clara No. 2 owners resumed work thereon in the month of March, 1877, and, after the possibility of future trouble to them arising therefrom was called to their attention by the remark of this passer-by, any other conclusion would place the defendant Mahan in the unenviable position of grossly deceiving his co-owners in the Clara No. 2 and inducing them to expend much labor and money upon that location while all the time he held a title purchased without their knowledge, which he believed would swallow up, absorb, and entirely defeat their Clara No. 2 location.

When I had arrived at this conclusion then all the remaining questions relating to the relative situations and condition of the Caledonia and Bobtail on and after the 28th day of February, 1877, were of easy solution. It enabled me to reconcile many ap-
116 parently conflicting statements of witnesses given as their reasons for fixing dates. It makes perfectly clear which party was prior in point of time in taking and retaining actual possession

of their locations after the 28th of February, 1877. Admit-edly by all parties the Clara No. 2 owners did not take such actual possession and resume work until after the Caledonia owners did, and that no one, other than Mahan, ever did do anything upon the Bobtail after April, 1876.

Now when I conclude—as seems to me cannot be doubted—that Mahan's interest in that claim first accrued when he took the deed from Ireton spoken of, executed some day subsequent to the 18th of March, 1877, then it is clear and beyond dispute that all the work spoken of by the witnesses as having been done in that vicinity in the early spring of 1877 was done upon the Clara No. 2, and not upon the Bobtail, and some days after the Caledonia owners had resumed work. This is further sustained by the physical fact that the Bobtail shaft, upon being cleared out—and this is where it is claimed that Mahan did the work on the Bobtail in the spring of 1877—is found at the date of this trial no deeper and of no larger dimensions than it was when left by Chizum and Ireton and Bayberg and Coleman in the spring of 1876. Evidently, inas-
117 much as the Bobtail and Clara No. 2 shafts are in close proximity—about 20 or 30 feet apart, in my recollection—the witnesses easily mistook one for the other, and, no doubt, honestly thought the work was going on upon the Bobtail shaft, whereas, in fact, it was upon the Clara No. 2 shaft. Again, another fact is disclosed by many of the defendants' witnesses which demonstrates clearer than words which claim the work was being done upon and when it was prosecuted. They speak of hearing persons at work down in the shaft, and of a windlass over it being used to hand up ore, the facts being that the Clara shaft was down some distance, so that a windlass was necessary and was being used, and men therein would be covered from view except when a person was standing directly over and looking into the mouth of the shaft, whereas the Bobtail shaft never at any time was more than about 4½ or 5 feet deep—not deep enough to cover a party working in it or to occasion the use of a windlass upon it.

But it is useless to pursue this further. The importance of the case demanded something more than the mere formal findings. The law governing the case, when once the facts were ascertained, seemed to be settled. I have been able to arrive at what I
118 regard as the real facts, so far as I am able to determine them from the evidence, and they are clearly with the plaintiff.

There are numerous matters of lesser moment in the case, but I regard these as the prominent and decisive ones. I cannot be expected to review the entire evidence, covering, as it does, thousands of pages.

Finding as I do—

First. That the Caledonia location was complete (save for the reservation) on the 15th of June, 1876.

Second. That at the time of the removal of the restriction caused by such reservation the Caledonia owners were in actual possession, engaged in working the ore in this disputed ground, and have been ever since in such possession with a complete and perfect location.

Third. That one of the essential requisites to a valid location, to wit, the marking of the surface boundaries, was wanting in the Bobtail until December, 1877.

Fourth. That Mahan took nothing by his deeds from Ireton and Chizum, because, besides other reasons, they had long before the giving of them wholly abandoned whatever rights they may
119 have had under their Bobtail location.

Fifth. That defendant Mahan did not, either as Bobtail or Clara No. 2 claimant, have possession of this disputed property at any time, and did not have actual possession or resume work anywhere upon either the Bobtail or Clara No. 2 in the spring of 1877 until after the rights under the Caledonia location had become perfect.

It follows that the case is with the plaintiff and judgment has been ordered accordingly.

The defendant Noonan is in the record as the grantee of Mahan, having no connection with the transactions by which the rights of the parties are determined, and so does not appear in these remarks.

120 In [the] District Court, First Judicial District.

CALEDONIA GOLD MINING COMPANY, Plaintiff,

vs.

t JOHN NOONAN and THOMAS F. MAHAN. Defendants.

TERRITORY OF DAKOTA, *County of Lawrence:*

To the above-named plaintiff and to Clagett & Dixon, its attorneys:

Take notice that on Monday, Nov. 29th, 1880, or so soon thereafter as the matter can be heard by the court, the foregoing motion — for the action of the court thereon.

McLAUGHLIN & STEELE,
Att'ys for Def'ts.

121 In [the] District Court, First Judicial District.

CALEDONIA GOLD MINING COMPANY, Plaintiff,

vs.

JOHN NOONAN and THOMAS F. MAHAN, Defendants.

TERRITORY OF DAKOTA, } *ss:*
County of Lawrence. }

Now comes the defendants above named and move the court to correct its findings of fact and conclusions of law herein by striking the same out and inserting the following instead:

1. That on the 28th day of February, 1877, and on the 1st, 2d, and 3d days of March following the defendant, Thomas F. Mahan, was in the actual and exclusive possession of and working upon that gold-bearing vein of rock in place called the Bobtail lode, developing the same, and had made a discovery of rock in place bearing gold on the east side of Shumache gulch, in Lawrence county, Dakota Territory, and worked thereon with regularity and diligence

until March 15th, 1877, when he caused to be made and posted
122 at the discovery shaft a location notice claiming fifteen hundred feet in length in a northerly direction from said discovery by a width of one hundred and fifty feet on each side of the centre of the vein, and calling the same the Bobtail lode, and caused the boundaries of said Bobtail lode to be marked upon the ground by substantial posts and stakes, so that the same could be readily traced.

2. That afterwards, on the said 15th day of March, 1877, M. Lynch, M. Heffron, Peter O'Neil, L. P. Elliott, Henry Lackey, J. M. Murphy, R. Curlin, and J. Manning entered upon and within said Bobtail lode, and posted a notice of a location at a shaft which had been sunk there prior to February 28th, 1877, claiming a mining location there which the- called the Caledonia lode, and extending five hundred feet in a southeasterly direction from said shaft and notice, and one thousand feet in a northwesterly direction from said shaft and notice by three hundred feet in width, but they did not at that time, or at any time from the 28th day of February, 1877, until about the 15th day of November following, cause to be marked the boundaries of the said Caledonia lode location so that the same could be readily traced.

123 3. That the office of the register of deeds of the county of Lawrence was first opened to the public for acts of registry on April 18th, 1877.

4. That the location certificate of the Caledonia lode posted thereon on March 15, 1877, and consisting of a copy of the location notice of the alleged Caledonia lode dated June 15, 1876, and what is designated as a supplemental notice of date March 15th, 1877, was filed for record in the office of the register of deeds of said Lawrence county, D. T., on April 25, 1877.

5. That the location certificate of the Bobtail lode posted thereon March 15, 1877, and consisting of a copy of the location notice of the so-called Bobtail lode, dated February 24th, 1876, and what is designated as the supplementary notice of March 15, 1877, was filed for record in the office of the register of deeds for Lawrence county, D. T., on May 10, 1877.

6. That each year after the said date of the location of the Bobtail lode, March 15th, 1877, work and improvement was done thereon of not less than one hundred dollars in value.

124 7. That at no time since February 28th, 1877, has there been any abandonment of forfeiture of the Bobtail lode to the present time.

8. That the deed of conveyance from M. Heffron, M. Lynch, Henry Lackey, Peter O'Neil, L. P. Elliott, J. M. Murphy, R. Curlin, and J. Manning, of date August 30th, 1878, acknowledged before H. H. Mund, notary public, and filed for record in the office of the register of deeds in said Lawrence county, purporting to convey "All and singular that certain quartz lode, ledge, vein or mineral deposit, mining ground, and mining property situated on the east side of Shumache gulch, in Lawrence county, Territory of Dakota and, known as and called the Caledonia lode or mine, said mining claim

having been located and recorded in the names of James Manning, Robert Curlin, Michael Lynch, & Michael Heffron in the month of June, 1876," conveyed no title to Thomas Bell, as the alleged and pretended mining location was illegal, and the subsequent deeds of conveyance. by Thomas Bell to the plaintiff conveyed nothing to it.

125 *Conclusions of Law.*

From the foregoing facts the court finds the following conclusions of law:

1. That the Bobtail lode mining location, known as the Bobtail lode, situated on the east side of Schumache gulch, in the county of Lawrence and Territory of Dakota, located by Thomas F. Mahan on March 15th, 1877, is prior in point of time to the so-called Caledonia lode location, with its boundaries marked upon the ground and a discovery of the vein or lode of gold-bearing quartz within the limits of said claim by work and improvement done thereon by and for said Thomas F. Mahan as and for the Bobtail lode.

2. That the pretended discovery shaft and location notice of said Caledonia lode were within the boundary lines of said Bobtail lode and were wholly invaiid.

3. That the defendants, John Noonan and Thomas F. Mahan, are the owners and entitled to the exclusive possession of the Bobtail lode, as the same is described by metes and bounds in their
126 answer herein; that judgment and decree in this action should be for the defendants for the possession of said Bobtail lead, including the ground in controversy, described in the plaintiff'- complaint herein.

Let judgment and decree be entered accordingly.

McLAUGHLIN & STEELE,
Att'ys for Def'ts.

And the following minutes and entry appears on the minutes of this court under date of November 29th, 1880, on page 417 of journal No. 1 of said court:

THE CALEDONIA GOLD MINING CO.

vs.

JOHN NOONAN & THOMAS F. MAHAN.

This cause comes on for hearing upon the motives of defendants to have the court correct its finding herein, D. McLaughlin, Esqr., of counsel, appearing for defendants & said motion, & Messrs. Clagett & Dixon, att'ys for pl'ff, *contra.*

The court, upon consideration thereof, *upon consideration thereof,* overrules and denies said motion & defendants except.

127 In [the] District Court, First Judicial District.

CALEDONIA GOLD MINING COMPANY, Plaintiff,

vs.

JOHN NOONAN and THOS. F. MAHAN, Defendants.

TERRITORY OF DAKOTA, *County of Lawrence:*

Service acknowledged November 29th, 1880.

CLAGGETT & DIXON,
Att'ys for Plaintiff.

McLAUGHLIN & STEELE,
Att'ys for Defendants.

128 *Motion for a New Trial.*

In [the] District Court, First Judicial District.

CALEDONIA GOLD MINING COMPANY, Plaintiff,

vs.

JOHN NOONAN and THOMAS F. MAHAN, Defendants.

TERRITORY OF DAKOTA, *County of Lawrence.*

Now come the said John Noonan and Thomas F. Mahan, defendants, and move the court to vacate and set aside its findings of fact, conclusions of law, and decision herein, and to grant the said defendants a new trial in this action, and for cause therefore allege the following good and sufficient reasons, to wit:

1. Because the court erred in admitting in evidence against defendants' objection the certified copy of the articles of incorporation of the Caledonia Gold Mining Company, marked Exhibit "A," as the same is incompetent, immaterial, and irrelevant.

2. Because the court erred in admitting in evidence against defendants' objection the second copy of the articles of incor-
129 poration of the Caledonia Gold Mining Company, certified to by Geo. H. Hand, secretary of Dakota Territory, marked Exhibit "B," as the same is incompetent, immaterial, and irrelevant.

3. Because the court erred in admitting in evidence against defendants' objection the certified copy of the resolution of appointment of A. J. Bigby as resident agent of plaintiff, marked Exhibit "C," as the same is incompetent, irrelevant, and immaterial.

4. Because the court erred in admitting in evidence against defendants' objection the certified copy of appointment of A. J. Bigby as resident agent of plaintiff, marked Exhibit "D," and certified to by Geo. H. Hand, secretary of the Territory of Dakota, as the same is incompetent, immaterial, and irrelevant.

5. Because the court erred in admitting in evidence against the defendants' objection the testimony of Michael Lynch in relating to acts done in connection with the so-called Caledonia lode location, on the easterly side of Shumache gulch, in Lawrence county, Dakota Territory, prior to the 28th day of February, 1877, as the same was incompetent and immaterial.

6. Because the court erred in admitting the testimony of J. M. Murphy in evidence against defendants' objection in relation to customs of recording quartz claims with a district mining recorder of the so-called Whitewood quartz mining district prior to February 28th, 1877, as incompetent and immaterial.

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7. Because the court erred in admitting in evidence against the defendants' objection the testimony of J. M. Murphy in relation to a record of the location certificate of the so-called Caledonia lode made and recorded by said Murphy as deputy recorder of said Whitewood quartz mining district on or about M'ch 15th, 1877, as the same is immaterial, irrelevant, and incompetent.

8. Because the court erred in admitting in evidence against the defendants' objection the testimony of J. M. Murphy in relation to contents of the location certificate of the Caledonia lode in 1876 and the record thereof during that year in the records of the Whitewood quartz mining district, as the same was immaterial and incompetent.

9. Because the court erred in admitting in evidence against the defendants' objection the testimony of J. M. Murphy in relation to a supplementary notice and record of the Caledonia lode made on or about the 15th day of March, 1877, in the records of the Whitewood quartz mining district, as the same is immaterial, irrelevant, and incompetent.

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10. Because the court erred in admitting in evidence against the defendants' objection paper marked Exhibit "E," purporting to be a copy of the location notice of the Caledonia lode, dated Gayville, June 21st, 1876, filed for record June 21st, 1876, with copy of affidavit of James B. Carr attached; that it is a true copy of the record of the said notice in the mining records of said Whitewood quartz mining district, and certified to be a true copy of the original on file in the United States land office at Deadwood, D. T., by A. D. Stewart, register, as the same is immaterial, irrelevant, and incompetent.

11. Because the court erred in admitting in evidence against the defendants' objection paper marked Exhibit "G," purporting to be a copy of the supplementary record of the Caledonia lode from the mining records, as the same is incompetent, irrelevant, and immaterial.

12. Because the court erred in admitting in evidence against the defendants' objection paper marked Exhibit "H," and purporting to be a copy of a record made Sept. 27th, 1877, to correct error in the number of feet claimed in the Caledonia lode, as the same is irrelevant and incompetent.

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13. Because the court erred in admitting in evidence against the defendants' objection the testimony of the witness Henry Lackey in relation to acts done in connection with the so-called Caledonia lode location, existence of boundary stakes, work, & notices prior to the 28th day of February, 1877, as the same are immaterial, irrelevant, and incompetent.

14. Because the court erred in admitting in evidence against defendants' objection the testimony of the witness John Dawson in relation to acts done, boundary stakes, amount of work, and notice

in connection with the so-called Caledonia lode prior to February 28th, 1877, as the same is immaterial, irrelevant, and incompetent.

15. Because the court erred in admitting in evidence against defendants' objection the testimony of the witness Robert W. Cooper in relation to acts done, boundary stakes, amount of work done, and notice in connection with the so-called Caledonia lode prior to February 28th, 1877, as the same is immaterial, irrelevant, and incompetent.

133 16. Because the court erred in admitting in evidence against defendants' objection the testimony of the witness Robert Curlin in relations to acts done, boundary *skates*, amount of work done, and notice in connection with the so-called Caledonia lode prior to February 28th, 1877, as the same is immaterial, irrelevant, and incompetent.

17. Because the court erred in admitting in evidence against defendants' objection the testimony of the witness William Gunn in relation to acts done, boundary stakes, amount of work done, and notice in connection with the so-called Caledonia lode prior to February 28th, 1877, as the same is immaterial, irrelevant, and incompetent.

18. Because the court erred in admitting in evidence against defendants' objection the testimony of the witness Mathew Moore in relation to acts done, boundary stakes, amount of work done, and notice in connection with the so-called Caledonia lode prior to February 28th, 1877, as the same is immaterial, irrelevant, and incompetent.

19. Because the court erred in admitting in evidence against defendants' objection the testimony of the witness James Lynch in relation to acts done, boundary stakes, amount of work done,

134 and notice in connection with the so-called Caledonia lode prior to February 28th, 1877, as the same is immaterial, irrelevant, and incompetent.

20. Because the court erred in admitting in evidence against defendants' objection the testimony of the witness Michael Heffron in relation to acts done, boundary stakes, amount of work done, and notice in connection with the so-called Caledonia lode prior to the 28th day of February, 1877, as the same is immaterial, irrelevant, and incompetent.

21. Because the court erred in admitting in evidence against defendants' objection the testimony of the witness James Carney in relation to acts done, boundary stakes, amount of work done, and notice in connection with the so-called Caledonia lode prior to February 28th, 1877, as the same is immaterial, irrelevant, and incompetent.

22. Because the court erred in admitting in evidence against defendants' objection the testimony of the witness, James Carney, on behalf of plaintiff as to what he did and knew after the 28th day of February, 1877, in relation to the so-called Caledonia lode, as the same is immaterial, irrelevant, and incompetent.

135 23. Because the court erred in admitting in evidence against defendants' objection the deed of conveyance of date August

30th, 1878, purporting to have been made by Peter O'Neil, James Manning, Henry Lackey, James Lynch, Robert Curlin, John M. Murphy, Michael Heffron, Louis P. Elliott, and John Morrow, of Lawrence county, Territory of Dakota, to Thomas Bell, of the county of San Francisco and State of California, acknowledged before H. H. Mund, notary public, on the same date and recorded in the register of deeds' office of Lawrence county, D. T., August 31st, 1878, in book 15, pp. 460, because the same is immaterial, incompetent, and irrevelant.

24. Because the court erred in admitting in evidence against defendants' objection the deed from Thomas Bell, of the county of San Francisco and State of California, to the Caledonia Gold Mining Company, dated Sept. 17th, 1878, acknowledged September 17th, 1878, before Edward Chatlin, commissioner for Dakota in San Francisco, California, and filed for record in the register of deeds' office in and for Lawrence county, D. T., September 25th, 1878, and recorded in book 24, pp. 50, '1, '2, '3, because the same is immaterial, incompetent, and irrelevant.

136 25. Because the court erred in admitting in evidence against defendants' objection the deed from Thomas Bell, of the county of San Francisco and State of California, to the Caledonia Gold Mining Company, dated December 10th, 1878, acknowledged Dec. 10th, 1878, before Edward Chatlin, commissioner for Dakota in San Francisco, California, and filed for record in the register of deeds' office in and for Lawrence county, D. T., December 18th, 1878, and recorded in book 24, pp. 351, because the same is immaterial, incompetent, and irrelevant.

26. Because the court erred in admitting in evidence against defendants' objection the testimony of the witness Wm. H. Workman in relation to acts done, boundary stakes, amount of work done, and notice in connection with the so-called Calenonia lode prior to February 28th, 1877, as the same is immaterial, irrelevant, and incompetent.

27. Because the court erred in admitting in evidence against defendants' objection the testimony of the witness Wm. H. Workman on behalf of plaintiff as to what he did and knew after the 28th day of February, 1877, in relation to the so-called Caledonia lode, as the same is immaterial, irrelevant, and incompetent.

137 28. Because the court erred in admitting in evidence against defendants' objection the testimony of the witness P. A. Gushurst in relation to acts done, boundary stakes, amount of work done, and notice in connection with the so-called Caledonia lode prior to February 28th, 1877, as the same is immaterial, irrelevant, and incompetent.

29. Because the court erred in admitting in evidence against defendants' objection the testimony of the witness P. A. Gushurst on behalf of plaintiff as to what he did and knew after the 28th day of February, 1877, in relation to the so-called Caledonia lode, as the same is immaterial, irrelevant, and incompetent.

30. Because the court erred in admitting in evidence against de-

fendants' objection the testimony of the witness John O'Neil, as the same is incompetent, irrelevant, and immaterial.

31. Because the court erred in admitting in evidence against defendants' objection the so-called rules and regulations of the pretended Whitewood quartz mining district, purporting to have been adopted at a miners' meeting at Gayville, December 31st, 1876, pre-
138 sided over by D. E. Costigan, president, as the same are incompetent, irrelevant, and immaterial; also in admitting the purported proceedings of a miners' meeting of March 6th, 1877, presided over by S. P. Bomans, chairman.

Also in admitting purported proceedings of miners' meeting of May 10th, 1877; S. P. Bomans, chairman.

Also in admitting purported proceedings of miners' meeting of June 8th, 1877; I. H. S. Coleman, chairman

Also in admitting purported proceedings Sept. 7th, 1877, of miners' meeting—W. H. Brown—chairman, as all these proceedings are immaterial, irrelevant, and incompetent.

32. Because the court erred in admitting in evidence against defendants' objection the testimony of the witness Lewis P. Elliott, as the same is immaterial, irrelevant, and incompetent.

33. Because the court erred in admitting in evidence against defendants' objection the testimony of the witness W. L. Smith in relation to document marked Exhibit "A," purporting to be a relocation of the Caledonia lode by metes and bounds, made March 2, 1878, as the same is incompetent and irrelevant.

34. Because the court erred in admitting in evidence against
139 defendants' objection the document marked Exhibit "A," signed with the names of James Lynch, Michael Heffron, Henry Lackey, Robert Curlin, Peter O'Neil, James Manning, John M. Murphy, Lewis P. Elliott, and John Morrow, dated March 2nd, 1878, filed for record in register of deeds' office in Lawrence county, D. T., March 2d, 1878, and recorded in book 13, pp. 292, as the same is incompetent, irrelevant, and immaterial.

35. Because the court erred in admitting in evidence against defendants' objection the testimony of the witness A. G. Bigby, as the same is incompetent, irrelevant, & immaterial.

36. Because the court erred in admitting in evidence against defendants' objection the testimony of the witness S. O'Neil in relation to matters connected with the so-called Caledonia lode prior to February 28th, 1877, as the same is incompetent, irrelevant, and immaterial.

37. Because the court erred in admitting in evidence against defendants' objection the testimony of the witness Michael Lynch as to value of work done on Caledonia lode prior to February 28th, 1877, as the same is incompetent and irrelevant.

38. Because the court erred in admitting in evidence against
140 defendants' objection the diagram marked Exhibit "E" (map made by H. C. Bohleder, showing two Bobtail locations, one 300 feet and the other 600 feet in width), as the same is incompetent, irrelevant, and immaterial.

39. Because the court erred in admitting in evidence against de-

fendants' objection the deposition of W. R. Keithly, containing Exhibits marked A, B, C, D, E, F, G, and H, as the same is incompetent, irrelevant, and immaterial.

40. Because the court erred in admitting in evidence against defendants' objection a pretended copy of the deposition of D. G. Chizum, purporting to have been taken on April 17, 1879, before J. J. Kreitzler, notary public, at Glasgow, Jefferson county, State of Iowa, as the same is incompetent, irrelevant, and immaterial.

41. Because the court erred in admitting in evidence against defendants' objection the deposition- of the witness D. G. Chizum, to wit, that of April 17th, 1879, that of January 10th, 1880, and that of May 10th, 1880, as the same are incompetent, irrelevant, and immaterial.

42. Because the court erred in admitting in evidence against defendants' objection the testimony of the witness Michael Gib-
141 bons as to acts, statements, and declarations of parties in relation to Clara Hill, Clara N-. 2, Clara N-. 1, Bobtail, and Caledonia lodes prior to February 28th, 1877, as the same are incompetent, immaterial, and irrelevant.

43. Because the court erred in overruling the objection of the defendants made to the following questions asked by plaintiff's counsel of the witness Michael Gibbons (see direct, book 21, page 23): "Please state when it was that you first heard that Mahan claimed, to have put up a notice there in '77," as the same is incompetent, immaterial, and irrelevant.

44. Because the court erred in admitting in evidence against defendants' objection the testimony of the witness William Gunn as to acts done, statements and declarations made, prior to February 28th, 1877, relative to Clara No. 2, Bobtail, Caledonia, and Queen of the Hills locations, as the same are incompetent, immaterial, and irrelevant.

45. Because the court erred in admitting in evidence against defendants' objection the testimony of the witness Wm. Gunn relative to acts done, statements & declarations made, by himself, Mathew Moor-, Michael Gibbons, and Thos. F. Mahan relative to Clara No. 2 lode after February 28th, 1877, as the same is incompetent, irrelevant, and immaterial.

142 46. Because the court erred in admitting in evidence against defendants' objection the testimony of the witness Mathew Moore as to acts done, statements and declarations made, prior to February 28th, 1877, relative to Clara No. 2, Bobtail, Caledonia, and Queen of the Hills locations, as the same is incompetent, irrelevant, and immaterial.

47. Because the court erred in admitting in evidence against defendants' objection the testimony of the witness Mathew Moore as to acts done, statements & declarations made, by himself, Wm. Gunn, Michael Gibbons, and Thos. F. Mahan relative to Clara No. 2 lode after February 28th, 1877, as the same is incompetent, immaterial, and irrelevant.

48. Because the court erred in admitting in evidence against defendants' objection the testimony of the witness John Manning as

to acts done, statements and declarations made, by Thos. F. Mahan, William Gunn, Michael Gibbons, and himself relative to Clara No. 2 lode prior to February 28th, 1877, as the same is incompetent, immaterial, and irrelevant.

49. Because the court erred in admitting in evidence against defendants' objection the testimony of the witness John Manning as to acts done, declarations and statements made, by Thos. F.
143 Mahan, Mathew Moor-, William Gunn, Michael Gibbons, and himself in relation to Clara No. 2 lode and Thos. H. Carr getting drunk after February 28th, 1877, as the same is incompetent, irrelevant, and immaterial.

50. Because the court erred in admitting in evidence against defendants' objection the testimony of the witness Robert W. Cooper as to acts done, declarations and statements made, by Thos. J. Mahan, William Gunn, Michael Gibbons, and himself in relation to Clara No. 2, Grand Prize, Queen of the Hills, and Bobtail lodes prior to February 28th, 1877, as the same is incompetent, irrelevant, and immaterial.

51. Because the court erred in admitting in evidence against defendants' objection the testimony of the witness Robert W. Cooper as to acts done, declarations and statements made by Thos. F. Mahan, Matthew Moore, William Gunn, Michael Gibbons, and himself in relation to Clara No. 2, Grand Prize, Queen of the Hills, and Bobtail lodes, as the same is incompetent, irrelevant, and immaterial.

52. Because the court erred in admitting in evidence against defendants' objection the testimony of the witness John Mahan, as the same is incompetent, irrelevant, and immaterial.

144 53. Because the court erred in admitting in evidence against defendants' objection the testimony of the witness William H. Clagett, as the same is incompetent, irrelevant, and immaterial.

54. Because the court erred in admitting in evidence against defendants' objection the testimony of the witness Michael Lynch, on being recalled, as to acts done, declarations and statements made prior to Feb. 28th, 1877, relative to the Caledonia, Clara No. 2, Bobtail and Empire lodes, as the same is incompetent, irrelevant, and immaterial.

55. Because the court erred in admitting in evidence against defendants' objection the testimony of the witness J. G. Moday, as the same is is incompetent, irrelevant, and immaterial.

56. Because the court erred in admitting in evidence against defendants' objection the testimony of the witness T. P. Gushuret in relation to what he did and said prior to February 28th, 1877, as the same is incompetent, irrelevant, and immaterial.

57. Because the court erred in admitting in evidence against defendants' objection the testimony of the witness Charles E. Barney in relation to all that he did and said prior to February 28th,
145 1877, as the same is incompetent, irrelevant, and immaterial.

58. Because the court erred in admitting in evidence against defendants' objection the testimony of the witness William H. Work-

man, on being recalled, as to what he did and said prior to February 28th, 1877, as the same is incompetent, irrelevant, and immaterial.

59. Because the court erred in admitting in evidence against defendants' objections the testimony of the witness Henry Lackey, on being recalled, as the same is incompetent, irrelevant, and immaterial.

60. Because the court erred in admitting in evidence against defendants' objections the testimony of the witness Squire C. Chezum, as the same is incompetent, irrelevant, and immaterial.

61. Because the court erred in admitting in evidence against defendants' objection the testimony of the witness Wade Porter as to conversation with Henry S. Ireton on the 10th of March, 1877, relative to Ireton giving up the Bobtail claim; had not done the work to hold it, as the same is incompetent, irrelevant, and immaterial.

62. Because the court erred in admitting in evidence against
146 defendants' objection the testimony of the witness A. J. Bigby as the same is immaterial, irrelevant, and incompetent.

63. Because the court erred in admitting in evidence against defendants' objection the deposition of Henry S. Ireton, taken at Winfield, Cowley county, State of Kansas, before E. J. Bedilion, October 16th, 1878, as the same is incompetent, irrelevant, and immaterial.

64. Because the court erred in admitting in evidence against defendants' objection the testimony of the witness John Dawson, on being recalled, as to acts done, declarations and statements made relative to the so-called Caledonia, Clara No. 2, and Bobtail locations prior to Feb. 28th, 1877, as the same is incompetent, immaterial, and irrelevant.

65. Because the court erred in admitting in evidence against defendants' objection the deposition of Francis Coyler, purporting to have been taken Jan. 25th, 1877, before G. Graham Minor, notary public, Custer county, State of Colorado, as the same is incompetent, irrelevant, and immaterial.

66. Because the court erred in admitting in evidence against defendant's objection the testimony of the witness Charles Noyes, as the same is immaterial and irrelevant.

147 67. Because the court erred in admitting in evidence against defendants' objection the testimony of the witness John H. Burns, as the same is immaterial and irrelevant.

68. Because the court erred in admitting in evidence against defendants' objection the testimony of the witness James P. Wooley, as the same is immaterial and irrelevant.

69. Because the court erred in overruling the motion of defendants' counsel, to strike out a part of question No. 13, put by plaintiffs' counsel to the witness, James B. Carr, on his direct examination, as the same was an improper suggestion to the witness, to correct his previous answer, and to which ruling defendants then and there excepted.

70. Because the court erred in admitting in evidence against defendants' objection the testimony of the witness J. M. Murphy, on being recalled, after James B. Carr'- testimony relative to his business and the recording of mining claims in the mining records of Thos.

H. Carr, at Gaysville, particularly the recording of the Caledonia, Queen of the Hills, and Clara No. 2 locations, as the same is incompetent, immaterial, and irrelevant.

148 71. Because the court erred in admitting in evidence against defendants' objection the testimony of the witness William Dana on the part of plaintiff, as the same is immaterial and irrelevant.

72. Because the court erred in admitting in evidence against defendants' objection the testimony of the witness James F. Watson on the part of plaintiff, as the same is immaterial and irrelevant.

73. Because the court erred in admitting in evidence against defendants' objection testimony on the part of plaintiff, to wit, the testimony of Michael Lynch and sundry other witnesses showing acts done, statements and declarations made, in relation to the alleged discovery and location of the so-called Caledonia lode on the east side of Shumache gulch, Lawrence county, Dakato Territory, in the year of 1876, and prior to the 28th day of February, 1877, and in considering the same and making findings of fact thereon, as the same are incompetent by reason of the then existence of an Indian reservation embracing the Black Hills, in which said locality is situated, and which was not open to exploration and settlement at that time.

74. Because the court erred in admitting in evidence testimony on the part of plaintiff, to wit, the testimony of Michael

149 Lynch and sundry other witnesses showing acts done, settlements and declarations made, in relation to the alleged discovery and location of the so-called Caledonia lode on the east side of Shumache gulch, Lawrence county, Dakota Territory, in the year 1876, and prior to the 28th day of February, 1877, and in considering the same and in finding conclusions of law thereon, as the same are incompetent by reason of the then existence of an Indian reservation embracing the Black Hills, in which said locality is situated and which was not open to exploration and settlement at that time.

75. Because the court erred in making finding No 1 as a fact in this action—that the Caledonia Gold Mining Company was a corporation organized and existing under and by virtue of the laws of the State of California.

76. Because the court erred in making finding No. 3—that the miners of Whitewood quartz mining district established said district and adopted rules and regulations, as set out in said finding, on the 30th day of December, 1876—as no body of miners could lawfully have formed a district or made rules and regulations in this portion of Dakota Territory at that time, by reason of its being a part

150 of an Indian reservation.

77. Because the court erred in making finding No. 4—that Michael Heffron, Michael Lynch, Robert Curlin, and James Manning discovered and located the Caledonia lode in the month of June, 1876, on the east side of Shoemaker gulch, in Lawrence county, Dakota Territory—as the locality of said Caledonia lode was

at that time within the limits of an Indian reservation and was not open to exploration, occupation, and settlement.

78. Because the court erred in admitting in evidence copies of location notices of the alleged Caledonia location proven to have been made, posted, and recorded in a pretended mining record in June, 1876, upon an Indian reservation upon which it was unlawful to enter or settle prior to February 28th, 1877—as the same are incompetent.

79. Because the decision of the court is not sustained by sufficient evidence.

80. Because the decision of the court is against law.

81. Because the court erred in making finding No. 5 for the same reason as given for finding No. 4.

82. Because the court erred in making finding No. 6, as
151 there was no competent legal proof of the so-called original staking of the Caledonia lode in June, 1876, and consequently its boundaries could not have been marked by such stakes on February 28th and March 1st, 1877, nor could there have been any discovery shaft thereon on said dates by reason of any prior working thereon; and said finding is not sustained by sufficient evidence and is against law.

83. Because the court erred in making finding No. 7, as the same is not supported by sufficient evidence.

84. Because the court erred in making finding No. 8, for the same reason as given for No. 7.

85. Because the court erred in making finding No. 9, as the same is not supported by sufficient evidence and is against law.

86. Because the court erred in making finding No. 10, as the same is immaterial and irrelevant.

87. Because the court erred in making finding No. 11, as the same is not supported by sufficient evidence and is immaterial.

152 88. Because the court erred in making finding No. 12, as no allegation of mistake in the record was alleged, and no reformation of the record was sought by the plaintiff in the pleadings, nor during the trial, and such finding is not pertinent to the issues raised by the pleadings and submitted to the court for trial.

89. Because the court erred in making finding No. 13, as the same is not supported by sufficient evidence.

90. Because the court erred in making finding No. 14, as the same is wholly immaterial, and is not sustained by sufficient evidence.

91. Because the court erred in making finding No. 15, in so far as it find- value for any work done on the alleged Caledonia lode prior to the 28th of February, 1877.

92. Because the court erred in making findings No. 16 and 17, as they are immaterial.

93. Because the court erred in finding as it did in finding No. 18 that James Manning, Robert Curlin, Michael Heffron, Peter O'Neil, Henry Lackey, James Lynch, John M. Murphy, and Lewis P. Elliott, who were then in possession of said Caledonia Mining
153 Claim, sold and conveyed the same by deed to Thomas Bell on the 30th of August, 1878, because the same is not sup-

ported by sufficient evidence, and that no title was acquired by Thomas Bell or his grantee, the plaintiff, by the deed mentioned of September 17th, 1877, and the other conveyance.

94. Because the court erred in making finding No. 19, as the same is immaterial.

95. Because the court erred in its conclusions of law numbered, respectively, I, II, III, IV, V, VI, VII.

96. Because the court erred in overruling the motion of defendants, filed herein November 29th, 1880, requesting the court to correct its findings of fact and conclusions of law herein as therein required.

97. Because the decision of the court is not supported by sufficient evidence.

98. Because the decision of the court is against law.

Wherefore the said defendants pray the court to vacate and set aside its findings of fact, conclusions of law, and decision herein, and to grant the said defendants a new trial in this action, and
154 restore the said defendants to all things which they have lost by reason of said findings of fact, conclusions of law, and decision heretofore found and rendered herein upon the trial of this action.

McLAUGHLIN & STEELE,
Attorneys for Defendants.

155 *Order Overruling Motion for New Trial.*

In the District Court, 1st Judicial District, in and for Lawrence County, D. T.

CALEDONIA GOLD MINING COMPANY, Formerly Henry Lackey *et al.*, Plaintiff,
vs.
JOHN NOONAN and THOS. F. MAHAN, Defendants.

The motion for a new trial herein heretofore made by the above-named defendants having been argued in open court by the counsel for the above-named parties, respectively, on the 10th & 11 days of January, A. D. 1881, and having on the 11th day of January aforesaid been taken under advisement by the court:

Now, on this 7th day of March, A. D. 1881, the court having carefully considered all matters of fact and law arising upon said motion for a new trial herein, and being fully advised in the premises, finds that said defendants are not entitled to a new trial as prayed for, and overrules their said motion therefor.

By the court:

G. C. MOODY, *Judge.*

Deadwood, D. T., March 9th, 1881.

156 To which ruling and decision of the court in overruling and denying said motion the defendants duly except, and at their request this exception is signed and made a part of the records in the said action.

Deadwood, D. T., March 9th, 1881.

G. C. MOODY, *Judge.*

Upon the back of which the following endorsement appears: Caledonia Gold Mining Company (formerly Henry Lackey *et al.*) *vs.* John Noonan & Thos. F. Mahan. Order overruling motion for a new trial. Filed March 9th, 1881. Frank J. Washabaugh, clerk.

157 In the District Court of the First Judicial District of Dakota Territory in and for Lawrence County.

CALEDONIA GOLD MINING COMPANY (Substituted as Plaintiff by Leave of Court in the Place of Henry Lackey, Lewis P. Elliott, John M. Murphy, James Lynch, Michael Heffron, James Manning, John Morrow, Peter O'Neil, and Robert Curlin, Former Plaintiffs Herein), Plaintiff,

vs.

JOHN NOONAN and THOMAS F. MAHAN, Defendants.

This action came on regularly for trial on the 12th day of July, 1880, at the regular January, 1880, term of said court, the plaintiff appearing by Clagett & Dixon, John M. Murphy, & Harry I. Thornton, its attorneys, and the defendants by McLaughlin & Steele and C. W. Bennett, their attorneys, and a trial by jury having been waived, by oral consent of parties in open court entered in the minutes and with the assent of the court, the action was tried by the court.

And thereupon the evidence, both oral and documentary, and both upon the part of the said plaintiff and the said defendants, was duly produced and heard by the court, and being concluded
158 the cause was argued by counsel for the respective parties and submitted, and was thereupon taken under advisement by the court.

And the court, having examined the case and being advised in the premises, afterwards, to wit, on the 13th day of September, 1880, at the regular August, 1880, term of said court, made & filed herein it written findings of fact and conclusions of law and its remarks in writing accompanying its decision, and ordered judgment and decree in favor of plaintiff and against defendants to be entered herein. And thereupon defendants obtained an order of court granting them time to make a motion for a new trial and staying proceedings until the hearing of said motion. And afterwards, to wit, on the 3d day of January, 1881, at the said August, 1880, term of said court, upon motion and application of defendants, the hearing of said motion for a new trial was ordered to be continued until the next regular term of said court, commencing on the 4th day of January, 1881.

And afterwards, to wit, on the 10th day of January, 1881, at the regular January, 1881, term of court, defendants' said motion for a new trial came on regularly to be heard, and was argued by counsel; and thereupon, on the 11th day of January, 1881, was
159 taken under advisement by the court. And afterwards, to wit, on the 7th day of March, 1881, at the said regular January, 1881, term of said court, the court, being advised in the premises, ordered that defendants' said motion for a new trial be overruled.

And now, on this 7th day of March, 1881, at the said regular Jan-

uary, 1881, term of said court and in open court, upon the motion of Clagett & Dixon, of counsel for plaintiff, the court having considered the case and being fully advised in the premises, it is by the court ordered, adjudged, and decreed that Henry Lackey, Lewis P. Elliott, John M. Murphy, James Lynch, Michael Heffron, James Manning, John Morrow, Peter O'Neil, and Robert Curlin, the former plaintiffs herein, were at the time of the commencement of this action, and the said Caledonia Gold Mining Company, their successor in interest, and the present plaintiff herein, is now, the owner and entitled to the possession of that portion of the Caledonia lode and mining claim, situated on the east side of Shoemaker gulch, in Whitewood quartz mining district, in the said county of Lawrence and Territory of Dakota, and being the ground in controversy in this action,
160 which is described by survey thereof as follows, to wit:

Beginning at the southeast corner of the said Caledonia lode and mining claim and running (with a variation of fifteen degrees east) thence south eighty-seven (87) degrees and forty (40) minutes west two hundred and seven and $\frac{6}{10}$th (207.6) feet; thence north 0 degrees thirty-five (35) minutes west one thousand and seventy and $\frac{7}{10}$th (1,070.7) feet; thence north eighty-nine (89) degrees and fifteen (15) minutes east eleven and $\frac{3}{10}$th (11.3) feet; thence south seventeen (17) degrees and forty-eight (48) minutes east five hundred and eighty-seven and $\frac{5}{10}$th (587.5) feet; thence south two (2) degrees and forty-five (45) minutes east four hundred and ninety-nine (499) feet to the southeast corner of the Caledonia lode and mining claim and place of beginning, containing three and $\frac{57}{100}$ (3.57) acres.

And that the right of possession thereto is in plaintiff.

It is further ordered, adjudged, and decreed by the court that defendants have not now and did not have at the time of the commencemement of this action any estate or interest in or right or title to said above-described portion of said Caledonia lode and mining claim, and that their claim thereto as against plaintiff is in-
161 valid and of no effect.

It is further ordered, adjudged, and decreed by the court that defendants, and each of them, and all persons claiming by, through, or under them, or either of them, be perpetually enjoined and restrained from hereafter claiming or asserting as against plaintiff any right or title in or to said above-described portion of said Caledonia lode and mining claim, and from further prosecuting any application for patent from the United States to said portion of said Caledonia lode and claim, and from trespassing upon or in any way interfering with plaintiff's possession and use thereof.

It is further considered and adjudged by the court that plaintiff have and recover of defendants herein its costs of this action, taxed at nineteen hundred and forty-two $\frac{65}{100}$ dollars, and that it have execution therefor.

By the court:

G. C. MOODY, *Judge.*

March 9th, 1881.

To which ruling & decision of the court the defendants duly ex-

cept, and at their request this execution is signed and made a part of the records of said cause.

G. C. MOODY, *Judge.*

March 9th, 1881.

162 [Endorsed:] In District court. Caledonia G. M. Co. (formerly Henry Lackey *et al.*) *vs.* John Noonan and Thomas F. Mahan. Decree. Filed March 9th, 1881, at 3:30 p. m. Frank J. Washbaugh, clerk.

163 *Bill of Exceptions.*

In the District Court, First Judicial District.

CALEDONIA GOLD MINING CO. *vs.* JOHN NOONAN. } No. 121.

Filed December 3d, 1881.

FRANK J. WASHABAUGH, *Clerk.*

TERRITORY OF DAKOTA, *County of Lawrence:*

Service of a copy of the within bill of exceptions, consisting of five books, acknowledged by copy this 7th day of June, A. D. 1881.

CLAGETT & DIXON,
Att'ys for Pl'ff.

Book 1.

Filed this 27th day of July, A. D. 1882.

B. S. WILLIAMS, *Clerk.*

Plaintiff- Case.

164 In [the] District Court, First Judicial District.

CALEDONIA GOLD MINING COMPANY (Formerly Henry Lackey *et al.*), Plaintiff,

vs.

JOHN NOONAN, Defendant.

TERRITORY OF DAKOTA, *County of Lawrence:*

The issues in said action came on for trial before the district court of the first judicial district of Dakota Territory, in and for Lawrence county, at a regular term thereof on the 12th day of July, 1880, Hon. G. C. Moody, associate justice of said Territory, presiding judge.

A jury having been waived all the issues arisi*ging* on the pleadings were tried by the court.

The plaintiff, to maintain the issues on its part, first offered in evidence a copy of its articles of incorporation certified by the
165 secretary of the State of California, and which was in the following words and figures:

And to the introduction of which the defendant, by his counsel,

at the time objected on the ground that the same was incompetent, irrelevant, and immaterial, which objection was overruled by the court, and to which ruling defendants' counsel then and there excepted.

166 The certified copy (marked Exhibit "A") was then read in evidence and was as follows:

EXHIBIT "A."

Articles of incorporation of the Caledonia Gold Mining Company.

Know all men by these presents that we, the undersigned, have this day associated ourselves together for the purpose of incorporating, under the laws of the State of California, a corporation to be known by the corporate name of the Caledonia Gold Mining Company.

And we hereby certify that the purpose- for which this corporation is formed are to conduct and carry on the business of mining and milling in all its branches in the Whitewood quartz mining district, Lawrence county, Dakota Territory, and to own, hold, use, and dispose of such mines, mining claims, di-ches, flumes, acqueducts, and such other real and personal property and water privileges as may be necessary for the purposes of the company.

That its principal place of business shall be in the city and county of San Francisco, State of California.

That the time of its existence shall be fifty years from and
167 after the date [of] its incorporation.

That the number of its directors or trustees shall be five, and that the names and residences of those who are appointed for the first year are—

Names.	Residences.	
Sol Heydenfeldt	San Francisco,	California.
Henry D. Bacon	do.	do.
M. L. McDonald	do.	do.
Frand Locan	do.	do.
J. W. Gashwiler	do.	do.

That the capital stock of this corporation shall be ten millions dollars, divided into one hundred thousand shares of the par value of one hundred dollars each.

That the amount of said capital stock which has been actually subscribed is twenty-five hundred dollars, and the following are the names of the persons by whom the same has been subscribed, to wit:

Names of subscribers.	No. of shares.	Amount.
Sol Heydenfeldt	5	$500
Henry D. Bacon	5	$500
M. D. McDonald	5	$500
Frank Locan	5	$500
J. W. Gashwiler	5	$500

In witness whereof we have hereunto set our hands and seals this second day of September, A. D. 1878.

168 SOL HEYDENFELDT. [SEAL.]
H. D. BACON. [SEAL.]
MARCH L. McDONALD. [SEAL.]
F. LOCAN. [SEAL.]
J. W. GASHWILER. [SEAL.]

Signed an- sealed in the presence of—
JAMES L. KING.

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

On the third day of September, in the year one thousand eight hundred and seventy-eight, before me, James L. King, a notary public in and for said county, residing therein, duly commissioned and sworn, personally appeared S. Heydenfeldt, Henry D. Bacon, Mark L. McDonald, Frank Locan, J. W. Gashwiler, known to me to be the persons whose names are subscribed to the foregoing instrument, and they duly acknowledged to me that they executed the same.

In witness whereof I have hereunto set my hand and affixed my official seal, at my office in said city and county, the day and year last above written.

[NOTARIAL SEAL.] JAMES L. KING,
Notary Public.

OFFICE OF THE COUNTY CLERK OF THE CITY AND COUNTY OF SAN FRANCISCO.

169 I, Thos. H. Reynolds, clerk of the city and county of San Francisco, State of California, and clerk of the county court thereof, do hereby certify the foregoing to be a full, true, and correct copy of the original articles of incorporation of the Caledonia Gold Mining Company, filed in my office on the fourth day of September, A. D. 1878.

Witness my hand and the seal of said court this 4th day of Sept., A. D. 1878.

[SEAL.] THOS. H. REYNOLDS, *Clerk,*
By JOHN. H. HARVEY,
Deputy Clerk.

(Endorsed:) Filed in the office of the secretary of state the 5th day of September, 1878. Thos. Beck, sec'y of state, by Wm. A. Beck, deputy.

STATE OF CALIFORNIA, *Department of State:*

I, M. Burns, secretary of state of the State of California, do hereby certify that I have compared the annexed copy of articles of incorporation of the Caledonia Gold Mining Company with the original now on file in my office, and that the same is a correct transcript therefrom and of the whole thereof.

Witness my hand and the great seal of the State, at —
170 office in Sacramento, California, the 24th day of February, A. D. 1880.

[GREAT SEAL.] D. M. BURNS,
Secretary of State,
By THOS. H. REYNOLDS, *Deputy.*

171 The plaintiff then offered in evidence a copy of the articles of incorporation of the Caledonia Gold Mining Company, certified by the secretary of Dakota Territory to be a correct copy of a duly authenticated copy of the original on file in his office; to the introduction of which in evidence the defendant objected on the ground that the same is incompetent, irrelevant, and immaterial, which objection was overruled by the court, and to which ruling the defendants then and there excepted.

The certified copy (marked Exhibit B) was then read in evidence, and was as follows:

EXHIBIT "B."

Articles of Incorporation of the Caledonia Gold Mining Company.

Know all men by these presents that we, the undersigned, have this day associated ourselves together for the purpose of incorporating, under the laws of the State of California, a corporation to be known by the corporate name of the Caledonia Gold Mining Company; and we hereby certify that the purpose for which this
172 corporation is formed are to conduct and carry on the business of mining and milling in all its branches in the Whitewood quartz mining district, Lawrence county, Dakota Territory, and to own, hold, use, and dispose of such mines, mining claims, ditches, flumes, acqueducts, and such other real and personal property, and whatever privileges as may be necessary for the purposes of the company.

That its principal place of business shall be in the city and county of San Francisco, State of California.

That the time of its existence shall be fifty years from and after the date of its incorporation.

That the number of its directors or trustees shall be five, and that the names and residences of those who are appointed for the first year are:

Names.	Residences.	
Sol. Heydenfeldt	San Francisco,	California.
Henry L. Bacon	do.	do.
M. L. McDonald	do.	do.
Frank Locan	do.	do.
J. W. Gashwiler	do.	do.

That the capital stock of this corporation shall be ten millions dollars, divided into one hundred thousand shares of the par value of one hundred dollars each.

That the amount of said capital stock which has been ac-
173 tually subscribed is twenty-five hundred dollars, and the fol-

lowing are the names of the persons by whom the same has been subscribed, to wit:

Names of Subscribers.	No. of Shares.	Amount.
Sol. Heydeneldt	5	$500
Henry D. Bacon	5	$500
M. L. McDonald	5	$500
Frank Locan	5	$500
J. W. Gasviler	5	$500

In witness whereof we have hereunto set our hands and seals this second day of September, A. D. 1878.

Signed and sealed in the presence of—

JAMES L. KING.
S. HEYDENFELDT. [SEAL.]
H. D. BACON. [SEAL.]
MARK L. McDONALD. [SEAL.]
F. LACON. [SEAL.]
J. W. GASHULER. [SEAL.]

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

On this third day of September, in the year one thousand eight hundred and seventy-eight, before me, James L. King, a notary public in and for said city and county, residing therein, duly commissioned and sworn, personally appeared S. Heidenfeldt, Henry D. Bacon, Mark L. McDonald, Frank Locan, and J. W.
174 Gushuler, known to me to be the persons whose names are subscribed to the foregoing instrument, and they duly acknowledged to me that they executed the same.

In witness whereof I have hereunto set my hand and affixed my official seal, at my office in said city and county, the day and year last above written.

[NOTARIAL SEAL.] JAMES L. KING,
Notary Public.

OFFICE OF THE COUNTY CLERK OF THE CITY AND COUNTY OF SAN FRANCISCO.

I, Thos. H. Raynolds, county clerk of the city and county of San Francisco, State of California, and clerk of the county court thereof, do hereby certify the foregoing to be a full, true, and correct copy of the original articles of incorporation of the Caledonia Gold Mining Company filed in my office on the fourth day of September, A. D. 1878.

Witness my hand and the seal of said court this 4th day of Sept., A. D. 1878.

[SEAL.] THOMAS H. REYNOLDS, *Clerk,*
By JOHN H. HARVEY, *Deputy Clerk.*

175 STATE OF CALIFORNIA, DEPARTMENT OF STATE.

I, Thomas Beck, secretary of state of the State of California, do hereby certify that I have compared the annexed copy of articles of

incorporation of the "Caledonia Gold Mining Company" with the certified copy of the original now on file in my office, and that the same is a correct transcript therefrom and of the whole thereof.

Witness my hand and the great seal of State, at office in Sacramento, this 5th day of September, A. D. 1878.

[GREAT SEAL.] THOMAS BECK,
Secretary of State,
By WM. H. BECK, *Deputy.*

Filed in the office of the secretary of state the 5th day of September, 1878.

THOMAS BECK,
Sec'y of State.
By WM. A. BECK, *Deputy.*

Filed this 19th day of Sept., 1878, and recorded in vol. 3 of Charters and Articles of Incorporation, on pages 64 to 69.

GEO. H. HAND,
Secretary of Dakota Territory.

UNITED STATES OF AMERICA, *Territory of Dakota:*

SECRETARY'S OFFICE.

176 I, Geo. H. Hand, secretary of the Territory of Dakota, do hereby certify that I have carefully compared the foregoing copy of the articles of incorporation of the Caledonia Gold Mining Company, which were filed in this office on the 19th day of September, 1878, with the duly authenticated copy of the original now on file in this office, and that the same is a correct transcript therefrom and of the whole thereof.

In testimony whereof I have hereunto set my hand and affixed the great seal of the Territory of Dakota, at Yankton, this 9th day of March, 1880.

[GREAT SEAL.] GEO. H. HAND,
Secretary of Dakota Territory.

177 Plaintiff then offered in evidence a copy of a resolution by the board of directors of the plaintiff appointing A. J. Bigby sup't and agent for the plaintiff in the Territory of Dakota, certified to be correct; to which defendants objected on the ground that the same was incompetent, immaterial, and irrelevant; which objection was overruled by the court, and to which ruling the def'ts then and there excepted.

The copy of the resolution (marked Exhibit "C") was then read in evidence and was as follows:

EXHIBIT "C."

Resolved, That A. J. Bigby be, and is hereby, appointed the agent and superintendent of this company to reside at Lead City, Lawrence county, in the Territory of Dakota, and he is hereby authorized for and in behalf of said company to accept service of process, and upon him service of process may be made in all actions in

in which this corporation may be a party, hereby delegating to him such powers as the laws of the Territory of Dakota require to be vested in such agent.

I, D. P. Chisholm, secretary *pro tem.* of the Caledonia Gold
178 Mining Company, do hereby certify, under the corporate seal of said company, that the above and foregoing is a full, true, and correct copy of a resolution passed by the board of directors of said company at a meeting of said board duly held at the company's office, No. 327 Pine street, San Francisco, California, on September 6th, 1878, at 2 o'clock p. m.

[SEAL.] D. B. CHISHOLM,
Secretary pro tem. of the Caledonia Gold Mining Company.

179 Plaintiff then offered in evidence a copy of a resolution by the board of directors of the plaintiff appointing A. J. Bigby sup't and agent for the plaintiff in the Territory of Dakota, certified to be correct; to which defendants objected on the ground that the same was incompetent, immaterial, and irrelevant; which objection was overruled by the court, and to which ruling the defendants then and there excepted.

The copy of the resolution (marked Exhibit "D") was then read in evidence and was as follows:

EXHIBIT "D."

STATE OF CALIFORNIA, *City and County of San Francisco:*

I, L. F. Verdenal, the duly appointed and acting secretary of the Caledonia Gold Mining Company, a corporation organized and existing under and by virtue of the laws of the State of California, do hereby certify and declare that at a meeting of the board of directors of the said Caledonia Gold Mining Company, held at the office of the company, in San Francisco, on the 6th day of September, A. D. 1878, the following resolutions was adopted, viz:

180 On motion of M. S. McDonald, seconded by J. M. Gashviler, it was unanimously—

Resolved, That A. J. Bigby be, and is hereby, appointed the agent and superintendent of this company to reside at Lead City, Lawrence county, in the Territory of Dakota, and he is hereby authorized for and on behalf of said company to accept service of process, and upon him service of process may be made in all actions in which this corporation may be a party, and service upon such corporation —, hereby delegating to him such powers as the laws of the Territory of Dakota require to be vested in such agent.

And I further certify that the foregoing is a true and correct copy of the said resolution and appointment as the same appears upon the book of records of said company on file in its office in the city and county of San Francisco, State of California.

In witness whereof I have hereunto set my hand and affixed the corporate seal of said company this ninth day of September, A. D. 1878.

[SEAL.] D. F. VERDENAL,
Secr. Caledonia Gold M. Co.

STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

I, Edward Chatlin, a commissioner for the Territory of
181 Dakota, a duly commissioned and qualified under and by virtue of the laws thereof, residing in the city and county of San Francisco, State of California, do certify that on the 9th day of September, A. D. one thousand eight hundred and seventy-eight, before me personally appeared, in said city and county of San Francisco. D. F. Verdenal, known to me to be the secretary of the Caledonia Gold Mining Company, and personally known to me to be the person whose name is subscribed to and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same as such secretary freely and voluntarily and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal at my office, in the city and county of San Francisco, State of California, this ninth day of September, A. D. 1878.

[COMMISSIONER'S SEAL.] EDW'D CHATLIN,
Commissioner for Dakota Territory in San Francisco, California.

Filed this 19th day of Sept., 1878, and recorded in vol. 3 of Charters and Articles of Incorporation, on pages 70 & 71.

GEO. H. HAND,
Secretary of Dakota Territory.

182 UNITED STATES OF AMERICA, *Territory of Dakota*:

SECRETARY'S OFFICE.

I, Geo. H. Hand, secretary of the Territory of Dakota, do hereby certify that I have carefully compared the foregoing copy of the resolutions of the board of directors of the Caledonia Gold Mining Company appointing A. J. Bigby agent of said company, which was filed in this office on the 19th day of September, 1878, with the duly authenticated copy of the original now on file in this office, and that the same is a correct transcript therefrom, and of the whole thereof.

In testimony whereof I have hereunto set my hand and affixed the great seal of the Territory of Dakota, at Yankton, this 9th day of March, 1880.

[GREAT SEAL.] GEO. H. HAND,
Secretary of Dakota Territory.

183 Mr. L. SMITH was then called as a witness on the part of plaintiff and testified as follows:

My business is surveying and engineering; have followed [it] since the fall of '59. I am acquainted with the Caledonia mine, in Whitewood quartz mining district. I surveyed that mine in November, 1877, along about the 14th or 15th. I preserved the field-notes of that survey. I assisted in making the official survey in May, 1879, upon which this adverse claim is grounded. That survey was made from the monuments established by myself in November, 1877.

Map
showing the
Caledonia Mines
as surveyed
November 14th 1877

Scale 200 ft to an inch

No 170.
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v.
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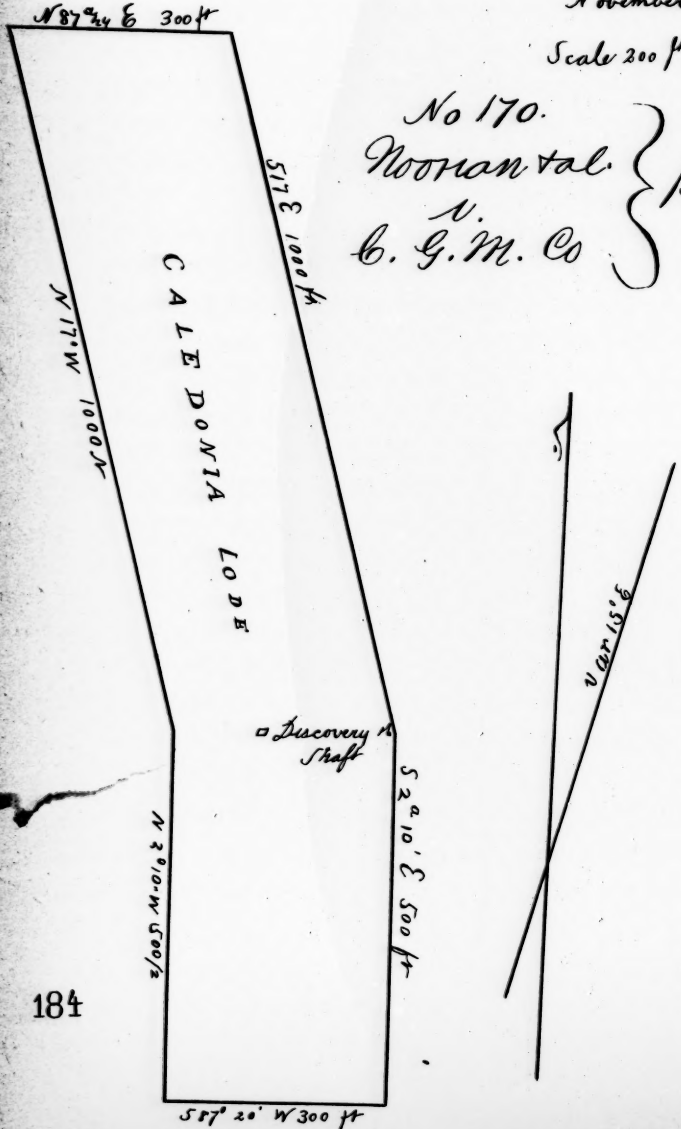
} p. 184



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The map hanging on the wall there was prepared from field-notes taken in November, 1877, in our office, and represents that survey correctly. It also represents the map designated as the official survey. The discovery shaft was taken as the initial point of that survey; the points marked upon that map were obtained by actual survey.

Plaintiff then ordered in evidence map of the Caledonia mine as originally located by Michael Lynch, Michael Heffron, Robert Curlin, and James Manning.

(Here follows diagram marked p. 184.)

185 On being cross-examined the witness testified as follows:

I surveyed the Caledonia mine in '77 for Michael Lynch, Michael Heffron, and others. I established all the corners represented on that map. We commenced at the discovery shaft. I did not trace the exterior boundaries; do not recollect now whether we made a map or not. We commenced at the point marked discovery shaft on map, and run in a southerly direction 500 feet; then we ran at right angles one hundred and fifty feet on each side of that point and established the southeast and southwest corner lines of the claim. We then measured 150 feet each side from Discovery shaft, and set two stakes for the angles of the claim; then commenced at Discovery shaft and run in a northwesterly direction a thousand feet; then we run from that parallel with the south end line 150 feet on each side of the center line, and set the northeast and northwest corners of the claim. At the southerly extremity of the centre line there was a black stump pointed out to me as the point to run to—pointed out to me as the

186 south end center stake, I think, or near the south end centre stake; do not think the measurement reached to the stump. We ran towards that stump; did not go to the stump to examine it; can't say, in point of fact, whether it was one of the original boundary stakes of the Caledonia or not; do not recollect of finding any stakes or mounds at the southeast or southwest corners; have got the field-notes at my office. If there was any note taken of old boundaries they will refresh my memory. I have no recollection of finding any stakes at the southeast or southwest corners at the points where we established them; do not think the distance from the south end of the centre line to the black stump would exceed 50 feet; do not recollect of finding any side centre stakes. There were some mounds and stakes of other leads in the vicinity of where I established the corners. I do not recollect now what stakes; think the northwest corner of the Minnie tunnel site was one; think I made connection with some other stakes there. I think the stake of the Minnie tunnel site stood a little northwest from the Caledonia

187 Discovery shaft; do not recollect now whether I made connection with any other stakes or not; do not recollect of seeing any old stakes or monuments at the north end marking the points represented by that map; think the survey was made about the 14th or 15th of November, '77. I think we made new stakes for all the corners. Michael Lynch, Michael Heffron, and one or two

of the owners at that time accompanied me on that survey; do not recollect of hearing any conversation in reference to swinging the Caledonia to the new location; did not go down in the discovery shaft; should judge it was 5 or 6 feet one way by 4 or 5 the other; do not know how deep it was; did not notice particularly; do not know whether there was a windlass there or not. There was a shed or blacksmith shop there, or something of that kind. The trail up Shoemaker gulch, I think, run very close to the stake at the angle on the west side; do not recollect about any road being constructed there at that time; did not notice particularly.

188 On re-examination the witness testified as follows:

The survey made in November, '77, was a private survey; did not look for exterior boundaries of Caledonia at that time, except that black stump. It was pointed out to me as being at or near the south centre stake by the members of the Caledonia Company. They directed me to run northwest. There was no stake or stump or monument of any kind that we run towards. They directed me to run to the left of the pile of dirt by the side of the shaft upon the top of the hill. There was a shaft or pile of dirt upon the hill. There is a hill about centre way of the claim. There was a shaft upon the top of the hill that we run just to the left of.

Plaintiff then offered in evidence the law of California contained in a bound volume entitled the Civil Code of the State of California, annotated by Creed, Haymond & Burch, of the California Code Commission, published in San Francisco in 1874.

189 MICHAEL LYNCH was then called as a witness on the part of the plaintiff and testified as follows:

James Manning, Henry Lackey, Robert Curlin, Michael Heffron, and myself discovered and located the Caledonia lode on the east side of Shoemaker gulch, near the head of it, in June, 1876. The first work that we did was to sink a shaft 8 feet in depth.

Here defendants' counsel objected to any testimony of this witness of what was done in making the Caledonia lode location in 1876 or at any time prior to the 28th of February, 1877, as the same is incompetent, immaterial, and irrelevant, which objection was overruled by the court, as follows:

"To save the point, I shall permit you to object, and I will receive the testimony subject to your objection."

190 I will, if satisfactory to the parties, admit, subject to their objections, the evidence offered by either party of acts of location and facts occurring prior to the 28th of February, 1877—

First. For the reason that if the case shall go to [a] higher court the evidence will be all in the record, to the end that the action may be determined by such courts without the necessity of a new trial, as we do not yet know what may be the views entertained by those courts of the effect of the existence of the Indian reservation, including this property in controversy, until the Feb'y 28th, 1877, treaty; and—

Second. Because I deem evidence of facts occurring prior to such

date, when they relate to and are properly connected with and tend to establish the existence of facts on and after February 28, 1877, essential to a valid mining location material and relevant.

Counsel need not make specific objection to this class of testimony, but may save the point when they come to make up their bill of exceptions, if one shall be made.

To these suggestions of the court the counsel for both parties consented, and the trial proceeded as follows:

191 I then put up a notice there and did work; sunk a shaft 7 feet deep. This was from the 14th to the 21st of June, 1876. Michael Heffron assisted me in the work. The shaft was sunk in gold-bearing quartz. I prospected the rock at that time and got gold out of it. Our work was right on the foot wall of the vein, as I supposed. The notice was put up the second day we worked there, and was dated the 15th of June, 1876. I wrote the notice and made a copy of it, and gave the copy to Heffron, who took it to the mining recorder's office at Gayville and had it recorded. I saw the record afterwards, and it bore date the 21st of June, 1876; this was the only difference from the copy I give Heffron. I do not know what became of the original notice which I posted upon the claim, nor can I tell when I saw it last. I first missed it about 3 months after posting it; it was put up on a pine stake which stood about 4 feet from the shaft, where there is a mound of rocks standing. The claim was staked in the same month by me as it was
192 claimed—500 feet southeasterly from the shaft and notice and 1,000 feet in a northwesterly direction. (Here witness was handed a paper purporting to be a copy of the notice placed upon the mining recorder's books at Gayville for examination.) This notice is not in my handwriting; it is in Judge Murphy's. I did not see this notice compared with my location notice. We claimed the Caledonia lode, 150 feet in width on each side of the vein, and 500 feet in length in one direction and 1,000 feet in the other.

The next work done on the Caledonia was under a contract that we let to Peter O'Neil and a man named Conley in July or August following. They were to sink a shaft 50 feet in depth for 500 feet of the ground. They done the work. Conley sold his interest in the contract to Lackey, and we subsequently deeded them the ground. The shaft was completed in January, '77.

The next work after this was done by Jim Manning, Bob Curlin, and my brother, and consisted of a drift running from the
193 bottom of the discovery shaft to the vein. They began work when O'Neil and Lackey quit in January, and kept working from January until May, except there may have been a change with them when they came down here to Deadwood for a few days and worked for a man named Brown on this placer claim right here. Then they came up right away again and worked on the Caledonia claim. It was in April, I think, that they came down here to work. They did not work every day on the mine.

Curlin and Manning had to represent a certain interest in it, and my brother represented my interest and Heffron's. With the ex-

ception of a day or two which they would knock off from time to time, they worked steadily on the mine from some time in January until April or May. In very stormy weather nobody in the country would work at that time.

At a settlement which we had with them afterwards for this work we allowed each one of these three men seventy-five dollars, at the rate of four dollars a day.

194 The next work was done by Curling and Manning on a contract which, to the best of my knowledge, was immediately after the work which I have last mentioned. I do not remember the date, but it was after they quit work for wages. We then let another contract to Lackey, Lynch, and Heffron to sink the shaft 25 feet. They sunk 6 feet, for which we paid them sixteen dollars a foot. All this work was done in the discovery shaft. We had some ore out on the dump after this work and made a contract with some mill-owners at Gayville to crush it and then we started in and built a road from the shaft.

In the fall of '77 we run a tunnel about 150 feet, but never completed it. We were at work running the tunnel when we sold the property to the Caledonia Mining Company. This tunnel is about 100 feet southeast from the discovery shaft. We began stopeing ore through it in October or November, '77, and from that time until we sold out were constantly working there and had the ore

195 milled. We sold in October, '78—in August, I believe, it was.

At the time we sold, my brother, Manning, Curlin, O'Neil, and others were there. I was not an owner at the time. The mine was turned over at the same time that the deed was made to the plaintiff.

I remember the time that there was considerable excitement here about relocating quartz claim. I posted up a new notice at that time. I was instructed to do so by John Dawson in regard to this Indian treaty. I went over to Gayville, saw Judge Murphy about it, made a new record of the Caledonia location, and on the following morning I put the notice up on the claim on a tree near the discovery shaft.

This tree stood some 5 or 6 feet from the shaft and I nailed the notice on it. It was not nailed inside of anything, but simply nailed upon the tree. I never saw that notice at any time nailed inside of a box. I afterwards saw another notice nailed up inside of a box on that tree, but that was a notice that Mr. Clagett gave me in 1878.

196 Witness was here asked the following questions:

[Q.] Now then did you make any record of that notice which you posted there the second time on that tree with the mining recorder?

Answ. Which is that?

Q. The notice that you posted the second time on the tree—that is in March, '77—did you record that with the mining recorder?

Answ. I did not.

Q. Was it ever recorded with the mining recorder?

To which question the defendants' counsel objected on the ground that the witness' testimony was not the best evidence, which objection was overruled by the court, and to which ruling defendant, by his counsel then and there excepted.

Q. I am not asking you about the notice that I gave you at all; I am asking you about the notice you put up after the Indian reservation in March, '77.

Same objection made by defendant's counsel as to the last interrogatory, and same ruling by the court and same exception.

197 Q. State as to whether that was ever recorded.

Answ. I did not do it.

Q. Did you ever see it upon the records?

Answ. I did.

Q. You saw it on the records how soon after it was posted upon the tree?

Answ. It must be in June or August following. When Heffron & I staked the Caledonia mine, in June, '76, we put up 9 stakes There was a birch tree standing at the southwest corner which I cut off and blazed, leaving the stump standing as a stake. We put up a pine stake for the south end centre, and also a pine stake at the southeast corner. At the northwest corner there was a pine stump which we marked, and also there was a pine stump marking the northeast corner, which is there to-day; the north center stake was also a stump; the west side centre stake was a stake, so was the east side center stake; all of these stakes and stumps were blazed, but I cannot tell on which side. We wrote material inscriptions on the stakes

198 showing what it was; they were marked with a lead pencil. At the time that I posted up the notice on the big pine tree, after the Indian reservation was removed, I cannot tell how many of these stakes marking the Caledonia claim were standing. I saw some of them there in January, February, or March. I think this birch stake was cut down at that time. It was cut down in the fall of '76 by the locator of the Cornucopia, I think. It afterwards fell in their shaft. To the best of my recollection, a stump marked the south centre end stake and stood about 20 feet to the southeast of our original centre end stake. I adopted that stump in March or February, '77. I could not tell the date. I blazed it. I saw both of the northwest corner stakes. I mean the northeast and the northwest. The north center end was not there. It had been cut off by some wood-choppers during the winter. I do not remember when I noticed it was gone.

J., February, or March, '77, I saw the side centre stakes—

199 the east centre. I had occasion in February or March to go around the claim. After the 28th of February, '77, I missed the southeast centre end stake at the time that I adopted the stumps. I did not put up any northeast corner stake after I found it was gone.

I had the claim surveyed by Mr. Wm. L. Smith in November, '77, and the stakes which he established were pretty near in the same

place where we had put them up in June, '76. The black stump that I had adopted in the winter of '77 as the south centre end stake was not made the south centre end stake, nor was it on the line of that survey. I had Smith lay out the centre line of the claim and the southeast line right w-ere I put the southeast centre stake in the first place, about 20 feet easterly from the stump. There were no changes made in the boundaries of the claim at that time that I know of, nor was any change made on the east side line drawing it in or spreading it out. The north end line was straightened at the time of the Smith survey in '77 to make it parallel with the
200 south end line.

Question by plaintiff's counsel:

I will ask you whether Mr. Smith when he made that survey did not run from the discovery stake in the direction of this black stump in order to get the centre line?

Ans. No, sir. I marked out the line from the discovery shaft, and he run the first line southeast toward the black stump. At the time of the commencement of this suit, in June, '78, they, my brother, and the company, were there working. I had sold out my interest in the claim to my brother in '77. I have the deed now in my possession.

On cross-examination the witness testified:

In 1876 I located in this locality, besides the Caledonia, the American Flag, the Nevada, and the Eureka lodes. The American Flag was over near Lead City, on the Old Abe Hill, which we called
201 the Giant or Clara Hill. I lived in Washington, now a part of Lead City, probably a quarter of a mile from Lead City, about where the 120 Stamp Homestake Mill now stands. I lived there right along from the 1st of June, '76, till the 1st of June, '77, and worked on the American Flag all the time.

Michael Heffron use- to live with me, and was interested in the American Flag. I would not tell where he was during all that time. I would not say where Curlin lived. He made his home there once in a while. He use- to work down here in Deadwood, on a mining claim, here in town. I do not know the name of the party for whom he was working.

My brother, James Lynch, lived with me and Heffron during that time, at Lead City. The principal work that he done was for me on the Caledonia, and use- to go over from Washington City in the morning and return in the evening, and staid in the same cabin with us.

James Manning, I think, lived in Gayville, and made that his home.

202 The American Flag lode and the Palmetto location were in conflict, but I cannot explain whether in the month of February, '77, I was unusually vigilant in watching the ground in conflict. The Palmetto owners and the American Flag owners watched each other's movements in regard to the possession of the ground, but I saw no warfare. There was no friendly feeling. I have no recollection that about the 25th of February, '77, that the

Palmetto and American Flag parties were in an attitude of watchfulness.

At this time Mr. Heffron was out in the Bear Butte district principally. I was alone there for myself.

In January and February Lackey was working in the Caledonia, and I think Peter O'Neil was, too.

I do not remember running off any parties off the Clara or Giant Hill along about the 25th of February, '77, or being one of a number who ran parties off who made adverse claims. No parties were ever run off that hill. I staid there working on that hill from the
203 1st of January, '77, down to the 1st of June, nearly all the time.

I made my home all the time in Washington from the time I sold out claim No. 17, above Discovery, on Whitewood, here in Deadwood, until I sold out in the Caledonia, and worked all the time on the American Flag, excepting when I worked on the Caledonia. Heffron is not very fond of working, and used to loaf at Bear Buttes most of the time instead of working. I posted up the discovery or location notice on the discovery stake at the discovery shaft of the Caledonia lode somewhere from the 15th to the 21st of June, 1876, and let a contract for sinking the shaft 50 feet to O'Neil & Conley. Conley sold out to Lackey. They began this work some time in June, July, or August, 1876, and it took them until about New Year's to complete it. We gave them their deeds some time the next fall. They sank the shaft 40-odd feet, and they drifted off towards the vein to complete the contract. I never measured the exact depth of the shaft, but they run about 6 feet of a drift from the bottom of the shaft to the southeast and cut the vein with the drift.
204 I cannot tell exactly the date of the completion of the contract, but it must be pretty near Christmas, to the best of my knowledge.

Robert Curlin, Jim Manning, and James Lynch commenced work in that shaft about 10 days after Lackey and O'Neil quit work. They began stoping ore from this drift and hoisting it out on the dump.

I cannot tell how long they were at work there, but we allowed them seventy-five or eighty dollars apiece as wages for the time they were at work. We sold the dump of ore to Pat Casey in '78. We allowed Manning, Curlin, and my brother four dollars a day, which was about the average wages paid at that time. We kept no books of account, but they demanded this sum from us for their work on the settlement after we sold out.

No one kept the time of these men while working, and no one reported it to us. We just took their word for it. I was there not less than four or five times each month, probably as often as twenty.

I cannot recall any occasion that I was there in January,
205 1877, nor can I recall any occasion that I was over there on the Caledonia mine in the month of February or March, 1877. I do not remember of any instance or circumstance that took me over there in those months. The reason why we had that shaft sunk deeper in May or June, 1877, is because we thought we would get richer ore by sinking it, and we sank it six feet.

It was not in May or June that we sunk it 6 feet. It was sunk 6 feet right immediately after the O'Neil & Lackey contract by my brother, Manning, and Curlin.

The witness proceeded to testify as follows:

Q. Where is your brother now?
A. He is here in town.
Q. Do you know what month that was done in?
A. Yes, sir.
Q. What month?
A. In '77.
Q. What month?
A. In '76.
Q. What month was the work, the six additional feet sunk in the bottom of the discovery shaft by your brother and Manning and Curlin?
206 A. It was done in ——
Q. Can you remember?
A. Yes, sir; February, '76.
Q. February, '76?
A. Yes, sir.
Q. What time in February; the early part, the middle, or the latter part?
A. Pretty much all the time of that month.
Q. It would not take those three men all of the month of February to sink six feet?
A. They had been working, as I told Judge Murphy and told the court here; they had been working in February and March, '76.
By COURT: '76 o- '77.
An. '76 – '77.
Q. You said, if we remember your testimony right, that they sunk, under the contract, down about 41 or '2 or '3 feet?
A. You are getting me tired now.
Q. I am pretty hard to understand?
A. You get me tired.
Q. Then if they drifted ——
A. Give me a rest.
Q. About six feet to the southeast you finished their contract?
A. What?
Q. Isn't that your testimony?
207 A. Another question that I answer you you have got to give me a good rest.
Q. I simply want to get your understanding of it.
A. I don't want you to make me out, neither.
Q. After you finished that contract you had an additional amount of work done there by which that discovery shaft was sunk about six feet?
A. Yes, sir.
Q. By these three men, Manning, Curlin, and James Lynch; when was that work done?

A. Right immediately after. Not by James Lynch. This contract was done about that time.

Q. How long would it take two men to sink six feet, ordinarily, in a shaft of that size?

A. We allowed sixteen dollars a foot for sinking that ground.

Q. How much?

A. Sixteen.

Q. That is pretty good price, isn't it?

A. No; I do not think it was a big price in this country at that time; everything was very high.

[Q.] How many feet a day, or how many inches a day, would two men sink a shaft of that kind—two ordinary miners?

208 A. I think I could make five dollars a day.

Q. If there was another man equally as good, both *as* you would make ten dollars a day?

A. No, sir.

Q. Sir?

A. No, sir.

Q. Why not?

A. The ground is hard.

Q. Cannot two men work in a shaft of that size?

A. Yes, sir.

Q. If you could make five dollars a day and the other man could make five dollars a day that would be ten dollars a day. Now, then, if they sunk six feet I want to know about how much in feet or inches on an average they would sink in that shaft on each day.

A. I do not believe they worked very hard.

Q. Yet you make five dollars a day?

A. I don't think they worked very hard at it.

Heffron accompanied me when I first staked the ground—a birch tree which I cut off and marked, leaving the stump standing—marked the southwest corner. The south centre end stake

209 was a pine stake of the common size, about 4 or 5 feet high; the southeast corner was also a pine stake of the same dimensions.

We measured the distance between these stakes with a tape-line, and measured the other lines around the claim in the same manner, except the northwest lines, which we guessed at. On one of the lines on the length of the claim we measured about 100 feet over the 1,500.

There must be one corner 100 feet too long. I instructed Surveyor Smith when he went on the ground in November, '77, to survey it, as Heffron and I had staked it in '76.

We established the southwest corner at the place where the birch tree stood or within 3 feet of it.

I cannot tell how far the southeast corner which he established is from where Heffron & I established it in '76, nor can I tell whether the south end of the claim has been swung in, but I think it is pretty near where we established it. It may be swung a little in regard to the angle. It was swung on the north end—that is, it was

drawn in, as we had more ground than we were entitled to, and the north end line was made parallel with the south end line.

210 The map there represents (referring to map marked Exhibit —) the general course of the claim as staked by Heffron and me, and it covers about the same ground.

I wrote the location notice on the wood of the discovery stake on the 15th of June, 1876, and signed the names of myself, Heffron, Curlin, and Manning to it; made a copy, which I gave to Heffron to have recorded in the mining records of Gayville. I made an exact copy of it for Heffron, but I think the recorder made a mistake in recording it.

Re-examination:

On the re-examination the witness further testified as follows:

The mistake is that in the record the date reads June 21st instead of June 15th, '76. The American Flag lode is distant from the Caledonia about 1,500 feet on the opposite side of the hill. Manning, Curlin, and Lynch worked on the Caledonia the first time for

211 wages and the second time under a contract. It was the second time, while working under contract, that they sank the 6 feet in the bottom of the shaft.

To all of which testimony of the witness, Michael Lynch, that relates to acts done and statements made prior to February 28, 1877, defendant objected as incompetent, immaterial, and irrelevant, and moved the court to have the same stricken out of the evidence in this cause for those reasons, which objection was overruled and the motion denied by the court in accordance with the suggestion of the court and consent contained in page 25½ of this bill of exceptions, and to save the point as there provided the defendant excepts.

212 J. M. MURPHY was then called as a witness on the part of the plaintiff and testified as follows:

In the month of March, '77, I was residing at Gayville, in Lawrence county, Dakota Territory, and acting as deputy mining recorder of the Whitewood quartz mining district; I acted in that capacity from some time about the middle of December, '76, until about the 27th of March, '77.

(Witness was here handed a paper by Mr. Clagget, of plaintiff'-counsel, for examination.)

This paper is in the handwriting of James B. Carr, who acted as deputy mining recorder after I had ceased to act as such.

The following questions were asked and answered as follows:

Q. I will ask you whether you had occasion to examine the original book in which the Caledonia — was recorded?
A. Yes, sir.
Q. How frequently?
A. Every day; probably 20 or 30 times a day.
Q. Did you examine the entry of the Caledonia record?

A. I made it myself.

Q. Have you examined the original entry that you made in '76?

213 A. Yes, sir.

Q. Turn to the paper and state whether it is or is not a correct copy of the original record of the Caledonia, made in '76.

[A.] The record bore date the 21st of June, '76, and the notice purported to be signed by M. Lynch, James Manning, R. Curlin, and Michael Heffron and claimed 150 feet on each side of the vein and 500 feet in length southeasterly and 1,000 feet northwesterly from the discovery, and the lode was called the Caledonia. I became an owner in this lode some time in February, '76, by purchase of an interest from James Manning. There was another record made of this location after the 28th of February—on the 15th of March, '77,—which was a copy of the record of the Caledonia lode on the mining recorder's books made in June, '76, with a supplementary notice added; I wrote out this second notice myself on that day, put it on the mining records, and then gave the notice to Lynch to take it up and post it on the claim; I have seen that record 50 or 60 times probably.

214 (Here witness was handed a paper by pl'ff's counsel purporting to be a copy of the record of March, 15th, '77.)

This is a copy of it in all, except that L. P. Elliott and J. M. Murphy have 250 feet each after their names; it should be 50 feet each.

(Witness was here handed another paper, purporting to be an abstract of title of the Caledonia lode, for his examination.)

This is an abstract of title and location certificate of the Caledonia lode, and is correct except in the amount of ground after Elliot and Murphy's names, which is a mistake, and must have occurred in the copying it on the mining and county records. This error I had corrected on the 25th of September, 1877.

Here plaintiff offered the following paper, marked Exhibit "F," in evidence; to the introduction of which the defendant, by counsel, objected, because the same is incompetent, which objection was overruled by the court in accordance with the suggestions of the court and consent contained on page 25½ of this bill of exceptions, and to save the point as there provided the defendants except.

215 EXHIBIT "F."

Caledonia Lode.

GAYVILLE, *June 21st*, 1876.

This is to certify that we, the undersigned, claim 1,500 feet on this lode or ledge of mineral, known as the Caledonia lode, running 500 feet in the southeasterly direction and 1,000 feet in a northwesterly direction and 150 feet on each side of crevice for mining purposes, located on the east side of Shoemaker gulch and about 800 feet northwest of the Clara mine.

Filed for record June 21st, 1876.

M. HEFFRON.
M. LYNCH.
R. CURLIN.
J. MANNING.

TERRITORY OF DAKOTA,
County of Lawrence, Whitewood District:

James B. Carr, being first duly sworn, deposes and says that he is the mining recorder of Whitewood district, in said county and Territory, and that the above and foregoing is a true and correct copy of the original location notice of the Caledonia lode as said
216 original appears of record in book (1) one, page (28) twenty-eight, of the mining records of said district.

Dated at Gayville, D. T., May (11th) eleventh, A. D. 1878.

JAMES B. CARR.

Subscribed and sworn before me the 11th day of May, A. D. 1878.
[NOTARY SEAL.] S. P. BOMANS,
Notary Public.

U. S. LAND OFFICE,
AT DEADWOOD, D. T., *July 10th*, 1880.

I hereby certify that the foregoing Exhibit "C" is a true and correct copy of the original on file in this office.

A. D. STEWARD, *Register.*

217 Plaintiff's counsel now offered in evidence the second paper, purporting to be a copy of the record made M'ch 15th, 1877, in the office of the mining recorder, and subsequently recorded in the office of the register of deeds of Lawrence county, on the 25th day of April, '77, which is marked Exhibit "G."

To the introduction of which defendant, by counsel, objected, on the ground that the same was incompetent, irrelevant, and immaterial, which objection was overruled by the court, and to which ruling defendant, by counsel, then and there excepted.

218 EXHIBIT "G."

Caledonia Lode.

GAYVILLE, *June 21st*, 1876.

This is to certify that we, the undersigned, claim 1,500 feet on this lode or lodge of mineral, known as the Caledonia lode, running 500 feet in a southeasterly direction and 1,000 feet in a northwesterly direction, and 150 feet on each side of crevice, — mining purposes.

Located on the east side of Shoemaker gulch and about 800 feet northwest of the Clara mine.

Filed for record June 21st, 1876.

M. HEFFRON.
M. LYNCH.
R. CURLIN.
J. MANNING.

The undersigned, being desirous — more fully comply with the laws of the United States, do hereby add this supplementary record to the said original location, to show present ownership and claim, and to cover any illegality that might attach to making mining locations upon an Indian reservation. Now, therefore, Congress having by treaty and purchase recently accorded to citizens of the United States the legal right to locate claims and possess
219 mining ground in this mineral district, the undersigned hereby locate and claim the above mentioned and described mining claim, known as and called the Caledonia lode vein or deposit, under the present existing United States laws and local laws of Whitewood district. Said mine and claim is situated about one mile from Gayville, Lawrence county, D. T., and on the east side of Shoemaker gulch, north on Clara hill. Claimants claim fifteen (1,500) hundred feet in length and 150 on each side of the lode, vein, or crevice; five hundred feet southeasterly from discovery shaft, and 1000 feet northwesterly from said discovery shaft.

This location made this 15th day of March, A. D. 1877, at 11 o'clock a. m., and is claimed by Henry Lackey, 250 feet; Peter O'Neil, 250 feet; L. P. Elliott, 250 feet; J. M. Murphy, 250 feet; M. Heffron, 250 feet; M. Lynch, 250 feet; R. Curlin, 250 feet; J. Manning, 250 feet.

TERRITORY OF DAKOTA, } ss:
County of Lawrence, }

220 I, Thomas H. Carr, district recorder of Whitewood mining district, do hereby certify that I have compared the foregoing copy of the location notice and supplementary record of the Caledonia lode and of the endorsements thereon with the original records of the same, as said original appears of record in book 3, page 433, of the mining records of said mining district, and that the same are correct transcripts therefrom.

Witness my hand this 24th day of April, A. D. 1877.

THOMAS H. CARR, *Recorder,*
By JAMES B. CARR,
Deputy Recorder.

Caledonia Lode.

Certified copy.

TERRITORY OF DAKOTA, } ss:
County of Lawrence, }

Filed for record this 25th day of April, A. D. 1877, at 5.30 o'clock p. m., and recorded in vol. "A" of location certificates on page 41, 42, and 43.

U. S. land office at Deadwood, D. T., July 10, 1880.

J. A. HAND,
Register of Deeds,
By C. E. HANRAHAN, *Deputy.*

221 I hereby certify that the foregoing Exhibit "D" is a true and correct copy of the original on file in this office.

A. D. STEWART, *Register.*

This supplementary record I had placed on the county records on the 25th of April, 1877, and the copy which I brought down had this error in it, and I did not discover it until some time in Sept. following, when I went and had a record made rectifying the error. There was still another record made subsequent to this in the office of the register of deeds of the Caledonia lode.

(Here witness was handed a paper purporting to be a copy of a supplement filed Sept. 27th, 1877.)

This is the supplementary record to correct the error.

Here plaintiff's counsel offered a paper marked Exhibit "H" in evidence, to which defendants' counsel objected on the ground that the same is incompetent, irrelevant, and immaterial, which objection was overruled by the court, and to which ruling defendants' counsel then and there excepted.

222 CALEDONIA LODE—HEFFRON, LYNCH, *et al.*

Filed at 10.15 a. m., Sept. 27th, 1877.

Supplement—Caledonia Lode.

This supplementary record [is] made to correct error in the number of feet due each owner, as follows, to wit:

Henry Lackey, 250 ft.; Peter O'Neal, 250 ft.; L. P. Elliott, 50 ft.; J. M. Murphy, 50 ft.; M. Heffron, 250 ft.; M. Lynch, 250 ft.; R. Curlin, 250 ft.; J. Manning, 150 ft.

This supplementary record is made to correct error in record filed this 25th day of April, A. D. 1877, and recorded in vol. A of location certificates, on page- 41, 42, and 43, the foregoing being the true number of feet each was entitled to at the date of said record, the error having been made in copying the original record from the local records of Whitewood mining district.

The county recorder's office was opened first for the filing of papers some time in April, 1877. He received and filed papers at the Big Flora store.

223 To all of which testimony of the witness, J. M. Murphy, that relates to acts done and statements made prior to February 28, 1877, defendant- objected as incompetent, immaterial, and irrelevant, and moved the court to have the same stricked out of the evidence in this cause for those reasons; which objection was overruled and the motion denied by the court, and to which ruling the defendants, by counsel, then and there excepted.

224 The witness further testified on cross-examination by C. W. BENNET, of defendants' counsel:

I went to the Caledonia claim two or three times after I came here in '76, and one of the reasons why I remember the contents of the

record of that location so well is that I was interested in it, but I do not remember what record preceded or followed it on the books.

About 4 or 5 hundred men came to the mining recorder's office on the 15th, or about the 15th of M'ch, to have supplementary notices drawn. I drew the first one; then there was such a rush that we had to employ clerks to act as deputies.

There was John Dawson, Michael Lynch, L. P. Elliott, Mattie Moore, Bill King, Frank Coyle, Augus McMarbers, James Dillon, Mike Gibbons, John Flaherty there on that day or a very short time afterwards—between that and the 20th. In fact, all the miners that had claim- in the country came there between the 15th and 27th.

The first supplementary location notice recorded after the
225 28th of February was by Mr. Baley, on the Golden Terra, and the next was by Major Wooley, and the third, I think, by James Carney, of the Pecacheo mine. I think Charley Jacobs came in about the same time. I think there was also one or two parties on the 14th of March. The supplementary records were kept in book- 3 & 4. I do not know whether copies of book- 3 & 4 are preserved. None of these supplementary notices were recorded in books one & two; I have a copy of these books. I went into the office on the 5th of December, '76, and remained there until the 27th of March, 1877. Tommy Carr was mining recorder, and he had the records in a little house in the rear of where I was, and after I was appointed I brought the books down to my office. He had the books in the day time and I had them at night. This condition of things existed during the latter part of December, 1876, and January, 1877. The books remained with the mining recorder until the 14th of May, 1878, when they were turned over to the register of deeds of Lawrence county.

226 HENRY LACKEY, one of the original plaintiffs, was called as a witness by the plaintiffs, who, being first duly sworn, testified as follows:

(Examined by Mr. CLAGGET:)

I became acquainted with the Caledonia mine some time in September or October, 1876. Peter O'Neal and Conley were at work on it at the time and the shaft was down in the neighborhood of 30 feet. I bought Conley out and O'Neil and myself sank the shaft to something over 40 feet, and I believe we ran a drift in the bottom. We took our pay for this work in an interest in the mine. I saw some of the exterior boundary stakes of the claim before I took that contract; they were not all up at that time. Mike Lynch showed me where there was marks on these trees or something. I do not know that the stakes were all up at any time. I went around the claim a short spell after I took this contract. The center stake at the shaft that the notice was on was up and the east side stake.
227 I think the south end stakes were up, but am not positive; think there was a stump blazed for the center end stake on the south end. I think one of the north end stakes was a stump, and the other was a stake, but I am not certain whether they were

all up or not. The southwest corner was a birch stump cut off about 4 feet high and was standing at the time. I did not see anything to mark the southeast corner. I would not say whether the west side center stake was up or not, nor can I say that I ever went to see whether it was up or not. We completed the contract some time in the winter following, some time between Christmas and New Year's, or along there.

The next work done on the mine was done by Jim Manning and Robert Curlin on the Discovery shaft; they commenced about two weeks after we quit. I got a bill of stuff for them from Start & Bullock. They worked off and on 5 or 6 weeks, I guess, for wages and did not stop very long at any time except when it stormed. I was there several times while they were at work, but I cannot
228 say when or how often; I was working at the time on the American Flag. Manning and Curlin run a drift in the ore and widened the shaft out some while they were working for wages. After this, some two or three weeks, they commenced work on a contract and they kept working straight along, sinking and building a road and putting up a cabin, and kept constantly to work pretty much all the time until we sold out.

I was present at the survey by Smith of the Caledonia lode in November, '77. I went around the claim with him and did not see that he made much of any change. The northwest corner stakes took in more ground than it does at the present time. I did not see any material change. I first saw the black stump marked at the south centre end stake some time in the fall of 1876—September or October. I do not know that there was any stakes standing after the 28th of February, 1877, except those trees. The birch
229 stump, on the ~~north~~west corner, at that time had been dumped into a hole or shaft when the frost thawed out of the ground. I passed frequently by the southeast corner in '77, very frequently; but I cannot say positive that there was any stake there marking that corner. I did not look for the stakes after the 28th of February, nor can I say what time it was that the east side centre stake was standing. The Discovery stake and notice were up when I bought *into* the claim in and this side centre stake was then upon the hill. I could not say that I saw it after the 28th of February, '77. It seems to me that I did see the west side centre stake after that time right alongside the trail going to Lead City, but couldn't say positively whether I saw any of the north end stakes after the 28th of February, '77.

About the time that the news came of the surrender of the Indian reservation another notice was posted on a tree near the Discovery. Manning and Curtin worked there in February & March, '77. I have seen them at work when coming over from the Ameri-
230 can Flag, and helped them to pack and sharpen their tools at Gold Run. I was at the Discovery in March, '77, the next day after the notice was posted.

I think the boys were then at work in the shaft. It was some time before that that they had been at work there; might be a week or two before. I got the memorandum of steel purchased for

the boys from Hefron. He bought the bill of steel, I think, some time in February.

By the COURT: Did you buy any steel for the use of these parties at that time?

A. I did not do it. Heffron bought it.

By same: Did you know of his buying it?

A. Yes, sir. I made it into drills for the parties at work on the Caledonia.

By same: When did you first make the arrangements for steel for them?

A. I did not make any arrangements for steel any more than I made the drills when Hefron brought the steel up for them to work with.

231 By same: When did you make the first—about the time?

A. It was along in the winter time.

By same: Can you tell whether January, February, or March?

A. Somewhere along in January, I guess.

To all of which testimony of the witness, Henry Lackey, that relates to acts done and statements made prior to February 28, 1877, defendant objected as incompetent, immaterial, and irrelevant, and moved the court to have the same stricken out of the evidence in this case for those reasons; which objection was overruled by the court and the motion denied, in accordance with the suggestions of the court and the consent obtained on page 25½ of this bill of exceptions, and to save the point as there provided, the defendants

232 except.

On cross-examination by defendants' counsel witness further testified as follows:

I cannot give the date when we completed our contract nor do I remember the month exactly. I was living at the time in Gold Run and was interested with Mike Lynch and Heffron in the American Flag. During the months of February and March, '77, we had disputes with adjacent locators—the Palmetto owners and others—and Lynch and Heffron and myself remained pretty close to that ground all during the spring of '77, and worked on it.

233 Q. 35. I would like to have you, if you can, tell the court when it was, at any time in the month of February, that you were over and saw these men working on the Caledonia lode; just give the time any occurrence that bears about the date in your recollection.

A. Well, it is a good while ago now; I could not state any particular time.

Q. 36. Can you state any particular occasion that you went over there—any circumstance that called you over or took you over?

Ans. No.

Q. 37. Can you state any particulars, circumstances, or occasion of your visit there during the month of March any time prior to the time you say you saw this notice put up?

A. I have been there quite often when they was at work.

Q. 38. Can you give any reason for your visit there at any of those times that you think you were there?

A. No; no particular reason that I know of.

Q. 39. Do you state it as a matter of certainty that when
234 you were over there the day after this notice was put up, about the 15th of March, by Lynch that you found men working there that day?

A. Yes, sir; I couldn't say positive the date; there was men working there about that time.

Q. 40. I am speaking about the particular day on which you saw the new notice put up. Can you state absolutely that men were at work there then?

A. There were men at work there then for wages—Bob Curlin & Jim Manning—working for wages at that time, I think.

Q. 41. They were then?

A. Yes, sir; before and after it, as near as I can judge.

Q. 42. Who did you see there working on that day that you saw the new notice put up?

A. Well, I could not say whether I seen anybody working the first day I seen the notice on that; I couldn't say, because it is a good while ago, but they were working on the mine at that time; whether they were to work the first day the notice was put up or not I couldn't say; they were working there before it and after.

235 JOHN DAWSON was then called as a witness on the part of the plaintiff, and testified as follows:

I became acquainted with the hill on which the Caledonia mine is located on the 24th of April, 1876, and on that day located the Clara mine, which is distant about 100 feet from the Caledonia, in a southerly direction. I was then living here in Deadwood. In the month of June I lived in Shoemaker gulch, on the ground located at the Caledonia. I saw the southwest corner stake and the south centre end stake of the Caledonia the evening they were put up, and all three of the south end stakes next morning; also I saw the west side centre stake in 1876, but never saw the east side centre stake nor the north side centre stake that I remember of. A shaft was sunk on the Caledonia in 1876 in gold-bearing quartz about 50 feet in depth, and there was other work done there during the winter and spring following. I was then living in Gayville,
236 and I was over the ground during that time; can't say how often. After the Indian reservation was broken up I saw a new notice on the Caledonia; I don't know the date exactly, but it was shortly after the notice was posted that I saw it, as the notice was quite new. I posted a new notice on the Clara ground within a week after that and had it recorded. I do not remember whether it was on the same day that I saw the Caledonia notice or not; it was pretty close to that time.

237 Q. 28. Where was it posted?

A. It was on that dry tree back of the shaft.

Q. 29. Have you been familiar with the Caledonia stakes since the Smith and Aukney survey in '77?

A. Well, I have been familiar with the south end stakes, and also the centre stakes. Not so familiar with the north end stakes.

Q. 30. These stakes that you describe as having seen in '76, the south centre end stakes, the southwest corner stake, and the west side centre stake, I will ask you whether those stakes were there during the summer of 1877, or spring, that you remember of?

A. No, sir; some of them was not, I know of.

Q. 31. How late?

A. I know that one of the stakes, this stump, the southwest corner stake, — in the spring when the frost was going out of the ground, and it tumbled into the Cornecopia shaft. That was in May some time.

Q. 32. Was it standing there until it tumbled in in May?

A. I don't know when it tumbled in.

Q. 33. Did you see it there the fall before?

A. Yes, sir; I saw it the fall before.

Q. 34. This black stump there; when did you first see that in the spring of '77?

238 A. I did not notice that stump at all; it was away in winter; either the fall of '76 or the spring of '77.

Q. 35. It was in the spring of '77?

A. Yes, sir.

Q. 36. The month of March?

A. Yes, sir.

Q. 37. State whether you saw in the month of March—February, March, or April—the west side centre stake down by the trail?

A. I don't remember of seeing that in the spring.

Q. 38. Has any change that you know of been made in any of the exterior boundary stakes of the Caledonia from the time you first saw them in 1876—that is to say, a change with reference to taking in a different piece of ground?

A. I am positive the first southwest corner stake that was planted in '76, the stake that stands there to-day, is not over three feet from the exact spot.

Q. 39. That is that burnt stump?

A. Yes, sir.

By COURT: Does that answer for the southwest corner now?

A. Yes, sir.

By COURT: You say it don't stand over three feet from where the southwest corner stood in '76?

A. Not over three feet.

By the COURT: Now, how about the west side centre?

239 A. Well, the west side centre stake—the survey—the stakes have been located in different positions.

By COURT: In what respect?

A. When they located the Caledonia they placed the centre stakes in what they claimed the centre of the claim, and the surveyor placed the centre stake opposite the discovery shaft—that is, 500 feet from one end and 1,000 feet from the other.

By COURT: That west side centre stake was at that time about how far from the southwest corner stake?

A. It was somewhere in the neighborhood of 750 feet.

By COURT: Was it on the same line that the side stake is now?

A. I think so, as near as I can judge.

Q. 40. State whether you were present or in sight of Heffron and Lynch at the time they stake- the Caledonia originally.

A. No, sir.

Q. 41. Did you see them do the staking?

A. No, sir; they came and borrowed an axe from me to do it and they told me they were going to; I saw them that very night when I came to camp.

Q. 42. Was any change made in this black stump; was that any different from the line of the Caledonia—from the original south centre end stake?

240 A. Well, I cannot swear to that position; the black stump is somewhere in the neighborhood of where the centre stake stood; it ain't in the exact spot, I am satisfied.

Q. 43. How much of a difference was there, so far as the centre line is concerned?

A. Well, I think the black stump is probably 550 feet from the discovery.

Q. 44. I am talking about the line. If you were to take and draw a line from the discovery shaft of the Caledonia to the original south centre end stake, then draw another line from the Caledonia discovery to the black stump, how far would they be apart at the present southerly end of the Caledonia?

A. Probably 20 or 30 feet.

Q. 45. Where would that black stump be with reference to the old original stake—to the west or east?

A. The black stump would be to the west.

241 To all of which testimony of the witness, John Dawson, that relates to acts done and statements made prior to February 28, 1877, defendant- objected as immaterial, incompetent, and irrelevant, and moved the court to have the same stricken out of the evidence in this cause for those reasons, which objection was overruled by the court and the motion denied, and to which ruling the defendant then and there excepted.

In accordance with the suggestions of the court and consent contained on page 25½ of this bill of exceptions, and to save the point as there provided, the defendants except.

242 ROBERT W. COOPER was then called as a witness on the part of the plaintiff and testified as follows:

I first became acquainted with the Caledonia mine, on the east side of Shoemaker gulch, Whitewood quartz mining district, in this county, in September, '76, about which time I became interested in the Queen of the Hills lode, adjoining the Caledonia on the east. The Queen of the Hills discovery shaft is about 350 feet distant from the Caledonia shaft in a northeasterly direction. I went to work on the Queen of the Hills and worked there off and on until about the middle of February, '77. I saw the discovery stake or tree, the east side line centre stake, the southeast corner stake, and the west side line centre stake of the Caledonia. I think I quit working there, on

the Queen of the Hills, February 19th, '77, and came down here to Deadwood and went to work for Mr. Anthony on placer claim No. 23, on Deadwood, and worked for him 9 or 10 days. I use- to go back to the Queen of the Hills every Sunday for a number
243 of weeks. I quit work for Mr. Anthony about the 1st of March, and bought into placer claims below and adjoining him on the 7th of March following. I fixed these dates by having gone to Mr. Anthony the other day and asked him a question and saw his book, and fix- these dates from his books. After I bought into these placer claims I was back there every Sunday. Our water wheel froze up down here. After that — and I went up and staid at the Queen of the Hills several days, and at that time saw a fresh notice posted upon a dry stump or tree about 20 or 30 feet high, near the discovery shaft on the Caledonia claim. I do not remember the exact date, and at that time in March or April I saw the last side center stake and the southeast corner stake standing. Our trail ran right by them. We went by them to and from our work and saw them almost every day. At this time my recollection is that O'Neal and Lackey had completed their contract, and that Curlin and Manning were working before I came down in February. I don't remember how long they had been working there be-
244 fore I came down, but about a month, I guess. I think Manning and Curlin commenced work soon after Lackey and O'Neal finished their contract, and continued work excepting when the weather was bad or something like that. My recollection is that I bought in here in the placer claims on the 7th of March, and that we did not get the water pumped out when a cold snap set in about the 10th or 12th and froze us up. They were not always at work when I went up there on Sundays. The boys lived right close to where I use- to go, and worked when the weather permitted.

To all of which testimony of the witness, Robert W. Cooper, that relates to acts done and statements made prior to February 28, 1877, defendant- objected as incompetent, immaterial, and irrelevant, and moved the court to have the same stricken out of the evidence in this cause for those reasons, which objection was overruled and the motion denied by the court. In accordance with the suggestions of the court and consent contained on page 25½ of this bill of exceptions, and to save the point as there provided, the defendants except.

245 On cross-examination by defendants' counsel witness testified as follows:

Got the dates of my work down here on Deadwood and buying in to the placer claims from Mr. Anthony; I cannot give the exact date in March, '77 that I saw Manning and Curlin at work on the Caledonia after I came down here; it might have been as late as the 20th of March.

On redirect examination the witness testified as follows:

In January and February, '77, I was working in the Grand Prize tunnel under cover; the Caledonia fellows were also under cover.

We posted a notice on the Queen of the Hills lode about the middle of March '77, but I do not remember seeing Manning and Curlin working on the Caledonia on that particular day. I think they were at work before that. I was up there on the Queen of the Hills when Judge Murphy sent over word that we would have to rerecord
246 our claims. Dawson brought over the word and we all went down and had our claims re-recorded. I was then working on the Grand Prize tunnel. I had been there working about a week, and I think they were working all the time I was up there on the Caledonia; they were at work all the time during the week on the Caledonia claim.

247 The deposition of ROBERT CURLIN was then introduced on the part of the plaintiff, in which he testified as follows:

In '76 and '77 I was residing in Deadwood, Lawrence county, Dakota Territory, and I know the Caledonia mine, and was one of the locators in June, 1876, about the 22d or 23d, but am not sure as to the precise date. We went to work upon the claim, and from the time of the location until March, '77, we was in possession and occupancy of the same and remained in quiet and peaceable possession of said mine from February, '77, until we sold out. We sunk a shaft, run a tunnel, built a road, and broke ore, and did considerable other work; I worked in the discovery shaft of the claim on a contract with the other boys, sinking it at so much a foot, and worked there in February and March, 1877. About the time of the relocation of the Caledonia, in March, '77, Manning and I were working the mine. A report was circulated that by reason of some act of Congress the claim would have to be relo-
248 cated. We adopted all the stakes as originally set up which were then standing; there were 9 stakes in all—three at each end, two side-line centre stakes, and the discovery stake. The notice of relocation was posted at the discovery shaft on an old dead pine tree partly broken off. There was a well-defined lode at the discovery shaft, and I was at work the- continuously from the 1st of February, 1877, until the 1st of April following and for a much longer period. When we relocated the claim, in March, '77, the original stakes were all up and could be distinctly seen and defined by any one. The Caledonia claim was alongside of and easterly of Shoemaker gulch and [the] discovery shaft was at an old dead pine tree.

To all of which testimony of the witness, Robert Curlin, that relates to acts done and statements made prior to February 28, 1877, defendant- objected as incompetent, immaterial, and irrelevant, and moved the court to have the same stricken out of the evidence in this cause for those reasons, which objection was overruled by the court and the motion denied, in accordance with the suggestions of the court and consent contained on page 25½ of this bill of exceptions, and to save the point as there provided the defendant- excepted.

249 WILLIAM GUNN was then called as a witness on the part of the plaintiff and testified as follows:

I first became acquainted with the Caledonia mine some time in '76. I was an owner in the claim adjoining—Clara No. 2. In the summer of '76 I saw the west-side centre stake, the east-side centre stake, and the 3 south-end stakes, and the discovery stake of the Caledonia. The discovery stake was a stake first and a tree afterwards. The first time I noticed the tree used as a discovery stake was after the supplementary notice had been posted on it in March, '77. The exact date I do not remember.

After the 28th of February, '77, the only stake- of the Caledonia that I saw [were] the south centre end stake and the southeast corner [stake]. This was in February, and I happened to pass by there, and I saw them afterwards in March and on through the summer. I also saw the west-side centre stake. They were substantially in the same places where I had seen them in the summer of '76. I don't think either of them had been changed.

250 I first saw the black stump southeast of the discovery some time in March, '77. A straight line drawn from the Caledonia discovery to the original south center end stake would be 12 or 15 feet eastwardly from the black stump.

I was living in Central in February, '77, and was occasionally over this ground as I passed to and from Lead City, and saw men at work there towards the latter part of that month—James Manning and James Lynch. They were working at the discovery shaft. I also saw them at work there a portion of the month of March, from about the middle of March on—that is, from the time I saw them at work in Feb. until about the first of April. I saw them there probably 4 or 5 times. I read the supplementary notice of the Caledonia which was posted on a tree. It claimed the ground as the same was originally located. We posted a new notice on our claim —the Clara No. 2—at the time of the excitement in regard to making the supplementary locations, and I saw the Caledonia notice the same day. I have followed mining for about 16 years,

251 and I would place the cost of sinking the Caledonia shaft at twenty-five dollars a foot in 1876.

The rock was pretty hard.

To all of which testimony of the witness, William Gunn, that relates to acts done and statements made prior to February 28th, 1877, defendant- objected as incompetent, immaterial, and irrelevant, and moved the court to have the same stricken out of the evidence in this cause for those reasons, which objection was overruled by the court and the motion denied. In accordance with the suggestions of the court and consent contained on page 25½ of this bill of exceptions, and to have the point as there provided, the defendants except.

252 On cross-examination the witness further testified as follows:

In the month- of February and March I was living on Hidden Treasure street, in Central, along with a man named Gorman, a man named Moore, and Robert Grace; worked some on the Patton

mine; don't remember how long. We had a contract to sink 10 feet. We were not very long doing it; not over two weeks. This was in February. It was easier rock to work than the Caledonia, and worth about $10.00 a foot. About the middle of March we commenced work on the Clara No. 2, and worked till about the 1st of May. I use to go over to Lead City and pass by the Caledonia discovery shaft as often as once a week. I have made no memorandum of any occurrence to fix any of the dates. I did not go down into the discovery shaft of the Caledonia, and cannot say whether they were sinking or cross-cutting or what they were doing. Lynch was generally at the windlass, and I saw the other men as they passed by where we were working, going to and coming from
253 their work. I did not see them working, only Lynch, whom I saw hoisting rock, and there must have been somebody below sending it up. To be correct, I only saw the man at the windlass at work. I do not recall the occasion of any single trip that I made to Lead City after finishing the work on the Patton mine until I went to work on Clara No. 2, nor do I recall any trip during that time that I did not see some one at work on the Caledonia. The weather at these times was pretty good, and it might have been that there were times that I passed by there when I did not see any one to work. I was well acquainted with Lynch, Manning, and Curlin.

254 MATTHEW MOORE was then called as a witness on the part of plaintiff and testified as follows:

I became acquainted with the Caledonia mine in August, '76. I never noticed the stakes much, but there was two on the trail where we used to pass up to work; these were the west centre side stake and the south centre stake. I was one of the owners in Clara No. 2. I was a partner with Gunn. In the winter and spring of '77 I resided in Central and had occasion to pass over the Caledonia and Clara No. 2 ground. I know that parties were working on the Caledonia about the latter part of March—after the 20th—which was the first time we went to work on Clara No. 2, and at that time Young, Lynch, Curlin, and Manning were working there. There was a pile of rock there, but as I never went to the shaft I don't know how much. We set to work that spring grading a dump, and from where we were at work the Caledonia dump was in plain sight, so
255 that a man with only one eye could see it. We worked along there at the Clara No. 2 dump and shaft until the last days of April, and Lynch and Curlin were at work there when we quit. I do not know how long they were at work there before we commenced on Clara No. 2—after the 28th of Feb'y '77. I never took any notice of stakes on the Caledonia until after they had made their survey. The black stump was a little on the upper side of the trail and at the left of it as you would go up southward. I saw work going on in the summer and fall of '77 on the Caledonia. In November, '77, they were running a tunnel, but I don't know how long it was. I couldn't say what was the value of sinking the shaft on the Caledonia in '76. I am not a very good figurer. We paid $20 a keg

for powder then and $5.00 a hundred for fuse. I would put it at $25.00 a foot if I was going to do it.

256 To all of which testimony of the witness, Matthew Moore, that relates to acts done and statements made prior to February 28th, 1877, defendant- objected as incompetent, immaterial, and irrelevant, and moved the court to have the same stricken out of the evidence in this cause for those reasons, which objection was overruled by the court and the motion denied, in accordance with the suggestions of the court and consent contained on page 25½ of this bill of exceptions, and to have the point as there provided the defendant- except.

257 JAMES LYNCH was then called as a witness on the part of the plaintiff and testified as follows:

I came to this mining district in August, '76, at which time I became acquainted with the Caledonia mine and then saw the south end centre stake and the southwest corner stake. The south end centre stake when I first saw it was a pine tree or stump, I would not be certain which, and the southwest corner stake was a birch stump.

I know when the Caledonia was sold to the present owners, which was in August, '78, and I saw these two stakes then where they were in '76, or a little west of where they were before, maybe 25 feet. After the 28th of February I saw this pine tree standing, or this pine stump, and I guess the birch tree was then cut down; some wood-choppers come in that spring or fall and cut down timber on the claim. I saw the east side centre stake once in February, '77; it was laying on the ground and some boys put it up and it remained after that in that place. I also saw the discovery tree in March, '77.

258 There was a box nailed on to it and a notice nailed in the box. This was nailed up on the 16th day of March, and the notice put in it at that time and was for the purpose of recording the claim.

I have no recollection of seeing any other stakes of the Caledonia mine except those that I have named. I commenced work on that claim in the early part of February, 1877, with James Manning and Robert Curlin, at the discovery shaft, and worked pretty much all the time until about the 20th of March or the latter part of March following. Manning was absent sometimes, but worked there pretty steadily; sent a man named James Burns there one time in his place. I worked pretty steady when the weather was favorable, and lived at Lead City with Mike Heffron and my brother. There was a severe snow-storm in the month of March, which I remember. The snow fell a depth of about 18 inches. It was after the notice that I speak of was put upon the tree for rerecording—some 5 or 6 days after the posting of the notice; maybe more. After this snow-storm we knocked off work, and the place where we worked

259 was flooded with water. From the time that we commenced work on the discovery shaft of the Caledonia, in the early part of February, we worked steadily right along until we were

obliged to quit temporarily on account of this storm. The weather was fine all this time, and we worked straight along. I do not remember that we missed a day's work during that time. I remember a miners' meeting at Gayville, or when word was sent around for the boys to come down, and we were working there at that time. I did not attend the meeting or go down to Gayville; Mannin- and Curlin did. This was some time in the early part of March, I think. Lou Elliott came up there frequently in February while we were at work. I also saw Tom Hanley there while we were at work; also a miner named Kennedy came up there with Jim Burns and Lou Elliott.

260 To all of which testimony of the witness, James Lynch, that relates to acts done and statements made prior to the 28th of February, 1877, defendants objected as incompetent, immaterial, and irrelevant, and moved the court to have the same stricken out of the evidence in this cause for those reasons, which objection was overruled by the court and the motion denied in accordance with the suggestions of the court and consent contained on page 25½ of this bill of exceptions, and to save the point as there provided the defendant- except.

On cross-examination the witness further testified as follows:

I stated on my direct examination that I knew where the south centre end stake of the Caledonia was in August, 1878. At that time it was a pine stump, a piece of wood hewed—blazed—I put up myself. It was probably 4 feet high or more. It was not a black stump. It was a pine stump. I don't know exactly whether it was
261 black. It was not in the same place where it was in August, '76. It was then 15 or 20 feet further to the east. I was there at the time of the survey in November, '77, but do not remember exactly where he set the south centre end stake.

Q. 21. How many sets of stakes did you have on the south end of the Caledonia from August, '76, until you sold out?

A. We had three.

Q. 22. Three sets?

A. On the south?

Q. 23. Yes, sir; the south end.

A. South corner—south end?

Q. 24. The south end.

A. We had three stakes.

Q. 25. But how many different sets of stakes did you have there during those two years?

A. I do not know as we had any more than one set.

Q. 26. You are quite certain that the south centre end stake was not a black stump?

A. I am not quite sure whether it was not black. I put it up myself, but I do not remember exactly whether it was black. It was pine.

Q. 27. A pine stump?

A. Yes, sir.

Q. 28. It was not black?

262 A. I sank the hole myself & put the stake down. I am not quite sure whether the south centre end was a black stump or not. I know it was a pine stump, as I sunk the hole and put it down. It (the stake) was near the trail. Smith in his survey adopted this stump, and it was in full view of the discovery shaft all the time. I do not know whether the southwest corner could be seen or not from the shaft, as there was a low sag down there.

The southeast corner stake stood about 15 or 20 feet away—maybe more or less—at the time we sold from where the birch tree stood in 1876, in a westerly direction, southwest from the Cornucopia shaft.

263 I was living with my brother and Heffron in January, '77, and worked that month on the Caledonia. I commenced work on the Caledonia in February—the latter part of February I do not remember the date exactly. I was not working for wages. I was representing my brother's interest. I kept an account of the time I worked. I worked 6 weeks in all; maybe more; probably 4 or 5 days. I never had any settlement for that work and never received a cent for it.

Curlin and Manning worked with me all the time; we worked together. They worked just about the same time I did. I do not know that they were getting anything for their work, and I do not know that they ever got anything. They said they would charge four dollars a day for what work they did outside their own interest. I never got anything for my work, and never demanded anything. No one kept any account of our work in particular. I do not remember of any account being taken. I never demanded any

264 pay for my work. O'Neal and Lackey finished their contract of 50 feet probably—maybe—might say—along about—some time in December; it may be later; I do not remember; probably after Christmas; I could not say.

We were off and on at the Caledonia in January, '77; would go there and bail out the water and keep the mine dry right along. I was there off and on all the time. After a snow or rain storm a couple of us would go over and bail out the water.

I do not remember whether I did any work there in January, '77, or not, nor whether I worked anywhere else or not in that month. I do not remember when Curlin and Manning worked in the month of January. I think it must be some time in the early part of Feb. when we went to work, because we had a snow-storm and we were talking when the snow-storm came how long we had been at work. I never made any memorandum of any occurrence that would enable me to fix the time when we went to work, but it was some time along between the first and the middle; probably it might be along towards the middle; I cannot say positive, but I am

265 pretty well positive it is. No one kept our time. We worked right along, except Sundays. I never heard Curlin and Manning demand any pay.

I worked shoveling down at the bottom of the shaft. The others were in the breast breaking ore. When I got a pile out I would go up and work on the windlass and hoist the tub. Sometimes Curlin

and Manning would work at the windlass too. I was generally stationed at the windlass. When they got out a good pile of dirt and ore one would fill the tub and the other assist me to hoist it. We probably hoisted during the time we were at work there 25 or 30 tons—maybe more. When we went to work the shaft was down about 50 feet and had a stope or drift in the bottom maybe 10 or 12 feet in length. There was a good opportunity to stope ore there when we went to work, and during the six weeks we were at work we may not have gotten out as much as 25 or 30 tons; maybe we got out more. I could not say for a fact what amount.

266 On re-examination the witness further testified as follows:

When we went there to work the drift was probably 10 or 12 feet long, 5 feet wide, and 6 feet high, and we extended it in, probably, 15 feet further and widened it out by stoping out ore. Afterwards Curlin and Manning got a contract on it and stoped it out more and made more room there; sunk the shaft deeper.

I do not remember when I put up the south centre end stake, but it was in '77, at the time of the survey by Mr. Smith. That was the time.

267 Q. 26. This work you did on that shaft—for whom were you working then, in February and March, '77?

A. I was working *at* my brother's interest.

Q. 27. Did you own any interest in the claim yourself at that time?

A. February, '77?

Q. 28. February and March, '77.

A. Yes, sir; I did.

Q. 29. How much of an interest did you own?

A. 200 feet.

Q. 30. How much did your brother owe?

A. He did not have any at that time.

Q. 31. Do you think that was before your brother had sold out to you, or after?

A. It was after.

Q. 32. After he had sold out to you?

A. Yes, sir.

Q. 33. When did your brother sell out to you?

A. The 12th of December, '77.

Q. 34. I am now talking about the work that you did on the shaft in January, '77—February, '77—this work that you and Curlin and Manning did; did you own any interest in the ground at that time?

A. Yes, sir.

Q. 35. Did you own any until you bought out your brother, or your brother made you a deed?

A. No, sir.

Q. 36. That was along the latter part of '77, wasn't it?

268 A. Yes, sir.

Q. 37. I am now talking about the beginning of '77.

A. Oh——

Q. 38. I will ask you again, did you, yourself, own any interest in it when you were working on that shaft in February and March,' 77?

A. No, sir.

Q. 39. How much did your brother own at that time, if you know?

A. I do not remember exactly; he had three hundred feet there.

Q. 40. Now, then, you represented his interest?

A. Yes, sir. Manning represented his own interest, which was about 200 feet; Curlin owned about 250 feet, and they represented their own interest. The work that was done by myself, Manning, & Curlin was credited to the assessment work due from the parties whose ground we represented, and the extra work over and above the representation was charged, as I understand it, at the
269 time. I never knew anything about any settlement about extra work; I was at the mine when the sale was made to Mr. Gashwiler; the two stakes of the surveyor were then standing, and we were going on with work at the time, stoping out ore.

On recross-examination the witness testified as follows:

I do not remember the date exactly of that sale; it took place in '77; that was the time that it took place; it was in the summer probably—after I got my interest—no; it was in '78; I am not positive whether it was early or late in the summer; I cannot remember exactly; I was not interested in the work which I did, but I remember that very well; that was in Feb'y; I cannot say what time in Feb., because I worked there.

270 By COURT: What makes you think it was in February instead of January?

A. We had a fall of snow along the early part of March, and we did not have any snow along in February; it was fine; and I am positive I worked up to the snow-storm; I was interested in the sale, but I do not recollect whether it was the early part of the summer or the latter part of the summer that it took place; I do not remember whether we had any snow in January, '77, or not, but I do not think the weather was fine in January as in February.

271 MICHAEL HEFFRON was then called as a witness on the part of plaintiff and testified as follows:

I am one of the original locators of the Caledonia mine. It was located June 15th, '76. It was not staked at the time it was located. We sunk a shaft 7 to 12 feet deep and put up a stake and notice right at the shaft. We wrote one notice on the stake, and — wrote another and give it to me and I took it to the recorder at Gayville on the 22d of June following and gave it to the deputy recorder for record, and he gave me a certificate. I paid him for recording. We then staked the claim—put up 9 stakes. The side stakes stood 150 feet from the discovery shaft, and there were 3 on each end. We blazed them on each side of the stake, and there was writing put on all of them on the side facing the claim. Lynch done the writing. The shaft was sunk in the foot-wall—some of it in country rock. On

the east side of the shaft it was quartz. The lead dips to the
272 east. Mineral-bearing rock was exposed in the shaft which contained gold. I do not know when O'Neal and Conley commenced work on the shaft, as I was in the States and got back here a little before New Year's, '77. They had completed their work before I got back. I do not know how long before. Jimmie Lynch, Curlin, and Manning did work there in February—the 1st of February. I was living at the time in Lead City. During the most of February and March I was over at Bear Butte ; left here about the 10th, and Curlin and Manning were working at the discovery shaft of the Caledonia when I left. I staid at Bear Butte until about the 18th of March; then I came back here, and a couple of days afterwards went up to the Caledonia mine and found Lynch, Manning, and Curlin at work in the discovery shaft. I fix the date of my return here because I know I was working at Bear Butte on the 17th of March—St. Patrick'- day. I left there the day after St. Patrick'- day. I cannot tell when Curlin and Manning went to work by contract, but the agreement to let them have the contract after they got
273 through with what they were doing was made before I left for Bear Butte in February. I bought some steel for them of Graves and Curtis before I went over there, and was working myself on the American Flag before that time. I think I bought this steel en the 4th of February, and the bill was made out to me, and I brought it up to the company at the time we had our settlement in 1878, and gave it to Pete O'Neal, the book-keeper.

Curlin and Manning presented bills for work at the settlement in '78. I do not know how much they were allowed, but they were allowed something. We run the tunnel in the fall. We worked ore from the mine a couple of months, and kept milling down to May, '78, I think, and we were working on the mine after that until we sold out. I estimate all the work done on the Caledonia claim from the time of the location until the 1st of March, '77, at two thousand dollars. We built a road in '77 from the mine to Central City. We built over a mile of it—maybe more. I do not know what the cost was. We were engaged two or three weeks
274 from the 1st of March, '77, until June, '78. The value of the work done by us on the road and mine I estimate at $5,000—might be more.

I was there when Smith surveyed the mine in November, '77, but took no part in it. I saw him run the line from the shaft to the black stump. This black stump was not one of the original south centre end stakes as staked in June, '76, but was adopted as the south centre end stake, I think, in July, '76, because the original stake was taken away. It made a difference of about 20 feet. The south centre end stake was a hewed stake. The north end stakes were stakes. I think the northwest corner was a small tree. The northeast corner was a stake. The west side centre stake was a stake. The original east side centre stake was a stake. The birch stump was on the west side from the shaft.

The Cornucopia shaft is southwest from the Caledonia discovery, stands right on the end line, and the stake that stood right

275 there was a birch stump. The west side centre stake at the Caledonia was a stump or a tree. The southeast corner stake was a stake. I was not here in March at the time of rerecording the claims, but heard of it at the time. I came back from Bear Butte, at which time I saw a notice near the Caledonia shaft, put in a box and fastened on to a tree, the box nailed to the tree.

Before I went to Bear Butte, and after I came back, I saw the black stump south of the discovery, and the southeast corner stake, and the tree in which the discovery was, and the two side stakes; the southwest corner had caved into the Cornucopia shaft; when they first dug that shaft—I could not tell the time—I think I saw the northeast corner stake in March. I got word of the Indian reservation business over at Bear Butte about a week before I came back.

We sold the dump of ore at the Caledonia in the winter of '77–'8 to Casey. There was no change in any of the stakes that I know of in the Smiths survey from where they were originally placed. We aimed to get the stakes where they were before; that was his orders.

276 To all of which testimony of the witness, Michael Heffron, that relates to acts done and statements made prior to the 28th of February, 1877, defendant- objected as incompetent, immaterial, and irrelevant, and moved the court to have the same stricken out of the evidence in this cause for those reasons, which objection was overruled and the motion denied by the court. In accordance with the suggestions of the court and consent contained on page 25½ of this bill of exceptions, and to save the point as therein provided, the defendant- except.

On cross-examination by defendants' counsel the witness further testified as follows:

I cannot read writing. I mean, when I say I took the notice over to Gayville to file that I had it put on the record with the recorder. I don't know the difference between filing & recording, but there is a difference. I cannot write. I guess my name in that notice was Michael Hefron; I write my name mechanically; I do not write it M. Hefron. I do not know whether Lynch wrote his name M. Lynch or Michael Lynch. My name was written Michael
277 Hefron in the recorder's book. Parker was recorded at that time; I don't know the name of the deputy; I handed the notice to the deputy.

I think it was in October, '76, that I went out to the States, but would not be certain at to the date. I could not keep an occurrence like that in my memory as to the date if I had to take it afoot. I do not remember the date. I went from here to St. Louis, where I remained a couple of weeks; then I went to Missouri—to St. Joe. I was absent a couple of months. I think it was the early part of October that I went away from here, and I got back before New Year's day. I was here in Deadwood on New Year's day. O'Neal and Lackey had completed their contract before that time. I don't know whether the Smith survey was in November or not, but think it

the east side of the shaft it was quartz. The lead dips to the
272 east. Mineral-bearing rock was exposed in the shaft which contained gold. I do not know when O'Neal and Conley commenced work on the shaft, as I was in the States and got back here a little before New Year's, '77. They had completed their work before I got back. I do not know how long before. Jimmie Lynch, Curlin, and Manning did work there in February—the 1st of February. I was living at the time in Lead City. During the most of February and March I was over at Bear Butte ; left here about the 10th, and Curlin and Manning were working at the discovery shaft of the Caledonia when I left. I staid at Bear Butte until about the 18th of March; then I came back here, and a couple of days afterwards went up to the Caledonia mine and found Lynch, Manning, and Curlin at work in the discovery shaft. I fix the date of my return here because I know I was working at Bear Butte on the 17th of March—St. Patrick'- day. I left there the day after St. Patrick'- day. I cannot tell when Curlin and Manning went to work by contract, but the agreement to let them have the contract after they got
273 through with what they were doing was made before I left for Bear Butte in February. I bought some steel for them of Graves and Curtis before I went over there, and was working myself on the American Flag before that time. I think I bought this steel en the 4th of February, and the bill was made out to me, and I brought it up to the company at the time we had our settlement in 1878, and gave it to Pete O'Neal, the book-keeper.

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was. I might be mistaken. I was here on Christmas day, 1876. I would remember Christmas day as well as St. Patrick's day, and if I was away a couple of months and Smith'- survey took place in November I could not be present when he made that survey, but
278 I am not mistaken. I was present at the Smith survey when he established the south centre end stake, which was about 20 feet distant from the black stump in a southeasterly direction. My recollection is not pretty good. After coming back about Christmas I worked on the American Flag until I went over to Bear Butte, but did not work there all the time. Lynch and Lackey worked with me, and a man named Mulloy. James Lynch might have worked there some; he was living there with us. It was in February we sent Lynch and Curlin over to work on the Caledonia, about the first of the month. We made the contract with them at the town of Washington, near Lead City. Curlin & Manning, Lynch, and me made the contract. I think it was that they were to sink 25 feet at $15.00 a foot; they sunk only 6 feet. We never let them another contract. Before that they went to work on the shaft by day with Lackey. Lackey was working with Lynch and Curlin. I saw him at work with them in August or July, 1877—Lynch, Curlin, and Manning. Under the contract I made with them — run a bit
279 of a tunnel. The contract was to sink 25 feet of a shaft at $15.00 a foot.

I can't tell how long they was at work; it would take them a month or six weeks to do it in that kind of ground.

The ore that came out of the shaft that O'Neal and Lackey sunk in '76, and prior to my return from the States, laid on the dump until after my return from Bear Butte. It was in the fall of '77 that we made the road from the Caledonia mine down to the gulch. It was in the fall of the same year that we located the Caledonia mine that I went to St. Louis, and that was in '76; and the survey by Smith was in the fall of '77.

280 HENRY LACKEY, on being recalled by plaintiff, testified as follows:

I have searched for the memorandum that plaintiff's counsel desired relative to the time that the steel was bought of Graves & Curtis for making drills to work on the Caledonia —, and I have not been able to find it; I think I gave it to Judge Murphy; I had it about a year ago; I do not remember whether I showed it to Mr. Kingsley or not, and I do not remember when I got the bill.

The steel was bought by Heffron for the parties working on the Caledonia mine, and I know it was bought up there, and I made the drills for them; Manning, Curlin, & Lynch were working there at the time.

The bill that I got was from Graves & Curtis, and it might be some 3 or 4 months after the steel was got; I do not know whether Heffron bought the steel on credit or paid for it, but I do know he put in his bill for it at the time of the settlement, and he was paid.

I think this steel was got some time in Feb.—about the fore

part of the month; I cannot tell the exact time; I was work-
281 ing on the American Flag at the time, except when it was storming. There was quite a snow-storm in that month—about 3½ or 4 feet probably, and it blocked up the trail leading from Lead City to Central; I do not remember the time exactly, but I think it was the latter part of the month.

To all of which testimony of the witness, Henry Lackey, that relates to acts done and statements made prior to the 28th of February, 1877, defendant- objected as incompetent, immaterial, and irrelevant, and moved the court to have the same stricken out of the evidence in this case for those reasons, which objection was overruled by the court and the motion denied. In accordance with the suggestions of the court and consent contained on page 25½ of this bill of exceptions, and to save the point as therein provided, the defendants except.

On recross-examination the witness further testified as follows:

This snow-storm might have been in March. The steel that I worked into drills for the Caledonia parties came up after New Year's, probably two or three weeks after, and after O'Neal
282 and I had completed our contract.

Manning, Curlin, and Lynch were working for wages in the shaft at the time at $4.00 per day. I cannot explain why I did not keep the bill which these men presented for the labor, showing the time when they worked, as well as the bill for the steel. Curlin gave me a note of how much I was in debt to him and Manning for work on the shaft and I paid him. I paid them my share of the bill.

I could not tell now what my share was or how much I paid them. They brought in a bill against the company, after deducting their own part of the work, and they were paid. I paid them in Tom Hanley's saloon, at Central, somewhere about $70 or $80; somewhere along there.

283 JAMES CARNEY was then called as a witness on the part of plaintiff and testified as follows:

I became acquainted with the Caledonia mine in 1876 and owned in the Ellethea lode about 1,000 feet distant from it in a westerly direction. In March and April, '77, I had work done on the Ellethea lode. I cannot tell just when the work was done only by reference to the time when I paid for the work. The first entry of payment for work done on the Ellethea is the 26th of March. On that day I paid out $25.00, and on the 28th $12.00. My recollection is I only had one man at work—not more than two, however—and I paid four or five dollars a day. When I put the men to work on the Ellethea before these payments I was over the lower or northeast end of the Caledonia discovery shaft, but do not remember that I then saw any one at work there. I do not recollect of seeing any one at work on the Caledonia before May or June of that year.
284 I went over with Mr. Williams and another gentlemen when I put these men at work. I think it was about the 10th of

March. I know that the snow was quite deep at the time. I know there was quite a heavy snow-storm in March, '77.

On cross-examination the witness further testified as follows:

Have no memorandum to refresh my recollections as to the time of this heavy snow-storm in '77, but I must have been over this trail leading by the Caledonia about 15 days before I paid anything for this work done on the Ellethea. I remember the time when they were rerecording their claims here, but am unable to state whether it was before or after that that I put these men to work on the Ellethea. Mr. Williams had the Ellethea recorded. I did not go over the trail to Lead City that winter; not over once or twice. I think I went over in February, and passed in view of the discovery shaft of the Caledonia. I don't recollect seeing anybody at work there at that time. There might have been parties at work in the shaft—I did not see them.

285 JOHN M. MURPHY was then recalled on the part of the plaintiff and testified as follows:

I first became an owner in the Caledonia mine about Feb., '77; bought my interest from James Manning. Louis T. Elliott was named in the deed as a grantee with myself.

286 The plaintiff now offered in evidence the following deed from the owners of the Caledonia mine to Thomas Bell, of date August 30th, 1878, in the words and figures following; and to which deed defendant, by his counsel, then and there objected on the ground that the same is incompetent, immaterial, and irrelevant, and which objection was overruled by the court. In accordance with the suggestions of the court, and consent contained on page 25½ of this bill of exceptions and to save the point as therein provided, the defendant- except:

This indenture, made the 30th day of August, in the year of our Lord one thousand eight hundred and seventy-eight, between Peter O'Neal, James Manning, Henry Lackey, James Lynch, Robert Curlin, John M. Murphy, Michael Heffron, Louis P. Elliott, and John Morrow, of the county of Lawrence and Territory of Dakota, parties of the first part, and Thomas Bell, of the county of San Francisco and State of California, party of the second part, witnesseth: That the said parties of the first part, for and in consideration of the sum of sixty-five thousand dollars ($65,000), lawful money of the United States of America, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowl-
287 edged, have granted, bargained, sold, remised, released, and forever quit-claimed, and by these presents do grant, bargain, sell, remise, release, and forever quit-claim, unto the said party of the second part, and to his heirs and assigns, all and singular, their certain quartz lode, ledge, vein, or mineral deposit, mining ground, and mining property situated on the east side of Shoemaker gulch, in the Whitewood quartz mining district, Lawrence county, Territory of Dakota, and known as and called the "Caledonia" lode or

mine, said mining claim having been located and recorded in the name of James Manning, Robert Curlin, Michael Lynch, and Michael Heffron in the month of June, A. D. 1876, together with all the dips, spurs, and angles, and also all the metals, ores, gold, and silver bearing quartz, rock, and earth therein, and all the rights, privileges, and franchises thereto incident, appendant, and appurtenant, or therewith usually had or enjoyed; and also all and singular the tenements, hereditaments, and appurtenances thereto belonging or in anywise appertaining, and the rents, issues, and profits thereof; and also all the estate, right, title, interest, property possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part of, in, or to the said
288 premises, and every part and parcel thereof, with the appurtenances and privileges thereto incident, unto the said party of the second part, his heirs and assigns, forever.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

PETER O'NEILL. [SEAL.]
JAMES MANNING. [SEAL.]
HENRY LACKEY. [SEAL.]
JAMES LYNCH. [SEAL.]
ROBERT CURLIN. [SEAL.]
JOHN M. MURPHY. [SEAL.]
MICHAEL HEFFRON. [SEAL.]
LOUIS P. ELLIOTT. [SEAL.]
JOHN MORROW. [SEAL.]

TERRITORY OF DAKOTA, } *ss:*
County of Lawrence, }

I, H. H. Mund, notary public in and for said county, in the Territory aforesaid, do hereby certify that Peter O'Neil, James Manning, Henry Lackey, James Lynch, Robert Curlin, John M. Murphy, Michael Heffron, Louis P. Elliott, and John Morrow, personally known to me as the persons whose names are subscribed to the annexed deed, appeared before me this day in person and ac-
289 knowledged that they signed, sealed, and delivered the said instrument of writing as their free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this 30th day of August, A. D. 1878.

[SEAL.]

H. H. MUND,
Notary Public.

Mining Deed. Peter O'neil et al. to Thomas Bell.

TERRITORY OF DAKOTA, } *ss:*
County of Lawrence, }

I hereby certify that this deed was filed for record in my office at 5.30 o'clock p. m., August 31, 1878, and is duly recorded in book 15, page No. 460.

C. H. McKINNIS,
Clerk and Recorder,
By R. C. WEBSTER, *Deputy.*

290 The plaintiff now offered in evidence the following deed from Thomas Bell to the Caledonia Gold Mining Company, of date 17th day of September, 1878, which is in the words and figures following:

And to which deed defendant, by his counsel, then and there objected on the ground that the same was incompetent, immaterial, and irrelevant, and which objection was overruled by the court, and to which ruling defendant's counsel then and there excepted.

This indenture, made the seventeenth day of September, A. D. one thousand eight hundred and seventy-eight, between Thomas Bell, of the city and county of San Francisco, State of California, party of the first part, and the Caledonia Gold Mining Company, a corporation existing under and by virtue of the laws of the State of California, the party of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of five dollars, gold coin of the United States of America, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has remised, released, and forever quit-
291 claimed, and by these presents does remise, release, and forever quit-claim, unto the said party of the second part, and to its successors and assigns, all and singular that certain quartz lode, ledge, vein, or mineral deposit, mining ground, and property, situated on the east side of Shoemaker gulch in the Whitewood quartz mining district, Lawrence county, Territory of Dakota, and known as and called the "Caledonia" lode or mine, said mining claim having been located and recorded in the names of James Manning, Robert Curlin, Michael Lynch, and Michael Heffron in the month of June, A. D. 1876; also all of the right and title of the said party of the first part to that certain quartz lode mining claim situated on Shoemaker gulch, in said mining district, county, and Territory, and known as and called the "Bobtail lode" or mine, the same being fifteen hundred (1,500) feet, more or less, in length by three hundred (300) feet, more or less, in width on the surface, and having been discovered on the 21st day of February, A. D. 1876, and recorded in the record books of the said Whitewood mining district, in said county of Lawrence, on February 24th, A. D. 1876, in the names of H. S. Ireton, T. E. Carey, [and] D. G. Chizum, reserving, however, from the operation
292 of these presents all of the mining ground that lies outside of the lines of the Caledonia quartz claim and within the lines of the "Queen of the Hills," and covered by the Bobtail lode, the meaning and intent of the reservation being that all the mining ground covered by the "Queen of the Hills" lodes that lies within the lines of the Bobtail and outside the lines of the Caledonia is excepted from the operation of these presents, together with all the dips, spurs, and angles, and also all the metals, ores, gold and silver bearing quartz, rock, and earth therein, and all the rights, privileges, and franchises thereto incident, appendant, and appurtenances or therewith usually had and enjoyed; and also all and singular the tenements, hereditaments, and appurtenances thereunto belong-

ing or in anywise appertaining, and the rents, issues, and profits thereof; and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part of, in, or to the said premises, and every part and parcel thereof, with the appurtenances; to have
293 and to hold all and singular the said premises, together with the appurtenances and privileges thereto incident, unto the said party of the second part, its successors and assigns, forever.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

THOMAS BELL. [SEAL.]

Signed, sealed, and delivered in the presence of—
EDW'D CHATLIN.
JAMES L. KING.

UNITED STATES OF AMERICA.

STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

Be it remembered that on this seventeenth day of September, A. D. one thousand eight hundred and seventy-eight, before me, Edward Chatlin, a commissioner for Dakota Territory, within and for said city and county, personally appeared Thomas Bell, well known to me to be the person described in and who executed the within instrument, and duly acknowledged to me that he executed the same freely.

In witness whereof I have hereunto set my hand and affixed
294 my official seal, at my office in the city and county of San Francisco and State of California, this 17th day of September, A. D. 1878.

EDW'D CHATLIN,
Commissioner for Dakota in San Francisco, Cal'a.

Deed. Thomas Bell to Caledonia Gold Mining Company.

Dated Sept. 17th, 1878.
Recorded at request of —— ——, Sept. 25th, A. D. 1878, at 15 min. past 4 o'clock p. m., B. 24, p-. 50, '1, '2, & '3.

C. H. McKINNIS,
Register of Deeds.

Plaintiff's counsel then offered in evidence a deed of the same property from Thomas Bell to the Caledonia Gold Mining Company, dated December 10th, 1878, which is in the words and figures following, and to which deed defendant, by his counsel, then and there objected on the ground that the same was incompetent, immaterial, and irrelevant, and which objection was overruled by the court. In accordance with the suggestions of the court and consent contained on page 25½ of this bill of exceptions, and to save the point as therein provided, the defendants except.

295 This indenture, made the tenth day of December, in the year of our Lord one thousand eight hundred and seventy-

eight, between Thomas Bell, of the city and county of San Francisco, State of California, party of the first part, and the Caledonia Gold Mining Company, a corporation existing under and by virtue of the laws of the State of California, the party of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of five dollars, gold coin of the United States of America, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has remised, released, and forever quit-claimed, and by these presents does grant, bargain, sell, remise, release, and forever quit-claim, unto the said party of the second part, and to its successors and assigns, all and singular, that certain quartz lode, ledge, vein, or mineral deposit, mining ground, and property situated on the east side of Shoemaker gulch, in the Whitewood quartz mining district, Lawrence county, Territory of Dakota, and known as and called the "Caledonia" lode or mine, said mining claim having been located and recorded in the name of James Manning, Robert Curlin, Michael Lynch, and
296 Michael Heffron in the month of June, A. D. 1876; also all the right and title of the said party of the first part to that certain quartz lode *run*ning claim situated *on* Shoemaker Gulch, in said mining district, county, and Territory, and known as and called the "Bobtail" lode or mine, the same being fifteen hundred (1,500) feet, more or less, in length by three hundred (300) feet, more or less, in width on the surface, and having been discovered on the 21st day of February, A. D. 1876, and recorded in the record book of the said Whitewood mining district, in said county of Lawrence, on February 24th, A. D. 1876, in the names of H. S. Ireton, T. E. Carey, and D. G. Chizum, reserving, however, from the operation of these presents all of the mining ground that lies outside of the lines of the Caledonia quartz claim and within the lines of Queen of the Hills and covered by the Bobtail lode, the meaning and intention of this reservation being that all the mining ground covered by the "Queen of the Hills" lode that lies within the lines of the Bobtail and outside the lines of the Caledonia is excepted from these presents; together with all the dips, spurs, and angles, and also all the metals, ores, gold and silver bearing quartz,
297 rock, and earth therein; and all the rights, privileges, and franchises thereto incident, appendant, and appurtenant or therewith usually had and enjoyed; and also all and singular the tenements, hereditaments, and appurtenances thereto belonging or in anywise appertaining, and the rents, issues, and profits thereof; and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part of, in, or to the said premises and every part and parcel thereof, with the appurtenances; to have and to hold all and singular the said premises, together with the appurtenances and privileges thereto incident, unto the said party of the second part, its successors, heirs, and assigns, forever.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

THOMAS BELL. [SEAL.]

Signed, sealed, and delivered in the presence of—the words "granted," "bargained," "sold," and "heirs" struck out before execution—

EDW'D CHATLIN,
MRS. KEMPTON.

298 STATE OF CALIFORNIA,
City and County of San Francisco, } *ss:*

Be it remembered that on this 10th day of December, A. D. one thousand eight hundred and seventy-eight, before me, Edward Chatlin, a commissioner for the Territory of Dakota, duly commissioned and qualified within and for said city and county, personally appeared Thomas Bell, well known to me to be the person described in and who executed the within instrument, and duly acknowledged to me that he executed the same freely.

In witness whereof I have hereunto set my hand and affixed my official seal, at my office in said city and county of San Francisco, this 10th day of December, A. D. 1843.

EDWARD CHATLIN,
Commissioner for Idaho in San Francisco, California.

Deed. Thomas Bell to Caledonia G. M. Co.

Dated Dec. 10th, 1878.

LAWRENCE COUNTY, D. T.

Filed for record in my office December 18th, 1878, at 7 p. m., and recorded in book 24, page 351.

C. H. MCKINNIS, *Register.*

299 L. R. GRAVES was then called as a witness on the part of the plaintiff and testified as follows:

I am a member of the firm of Graves & Curtis, and were doing business here in February, '77. We were then merchandizing. All our books containing transactions for the year 1877 were destroyed in the fire in Deadwood in September, '79. I don't know Henry Lackey, but, I think, Michael Hefron got some steel of us in '77. I do not remember the time.

300 WILLIAM H. WORKMAN was here called as a witness on the part of the plaintiff and testified as follows:

I am a miner, and am now working for the Homestake Company. I became acquainted with the Caledonia mining claim in the fall of '76, and at that time saw all of the north end stakes, the centre stakes, and the location stake, and the southwest corner stake. The southwest corner stake was alongside of the trail, and was a dead pitch pine. I never saw a birch stake around the claim anywhere, and do not know where the Cornucopia discovery shaft was in '76. There was a hole sunk by that stake—the Clara No. 2. I saw the north end stakes and the location stake and the southwest corner in Feb. March, [and] April of '77, and I saw these stakes in '76. I owned

an interest in the Oro Fino, adjoining the Caledonia. Our discovery shaft on the Oro Fino was about 500 feet from the north end line of the Caledonia. I worked on the Oro Fino in Feb., '77; was
301 working there alone and living at Lead City, and usually traveled the route below the Caledonia shaft, 40 or 50 feet. Sometimes when the snow was deep I would go over the ridge above the Caledonia six or seven hundred feet, and the Caledonia shaft was in plain sight as I went on one or the other of these trails. I worked there until Gashurst let a contract to Bill Bodick on the 20th of March; worked every day except Sunday. I knew James Manning, Robert Curlin, and James Lynch, and they were sinking the Caledonia shaft and working then every day except Sunday. There was a big snow-storm about the 1st of March—from the 1st to the 10th—and we all continued work right along. I was down in the discovery shaft of the Caledonia about this time, and they were sinking the shaft and driving a drift in an easterly direction. I saw them bailing water out of the shaft in March, after this snow-storm.

The northwest corner stake of the Caledonia in '76 stood about 75 feet west of where it does now. The north centre and end stake
302 is swung some up the hill, northerly, I should judge, 75 feet. The south end stakes stand now very near where they did in '76; so do the centre stakes. I was working ground over on Bobtail gulch, claim No. 9, and every night had to go over the hill to gather fire-wood, and passed very near them.

As originally located there was no fraction of ground between the Caledonia and Oro Fino. Wood was cut in those claims in the months of March & April, '77, by parties who had a tunnel site there, and were cutting logs and rolling them down the hill. They were chopping them at the time of re-recording of claims here in March, '77. No, I did not see any of the northern stakes of the Caledonia in February or March, '77, because I did not go down that way. It was in April when I went to placer mining on Bobtail. One of the north end stakes stood right over where we were drifting, near the present back end of the Caledonia mill. I saw a fresh notice in March, '77, on the discovery tree of the Caledonia on the same day that it was posted up. It was inside of a
303 small box and tacked to the tree. Parties were working on the Grand Prize at that time—Mr. Cooper, Mr. Delaney, and two or three others. After Cooper quit work the owners of the Grand Prize, whose names I forget, continued work driving a drift and taking ore out. They worked there right along all through the month of March.

To all of which testimony of the witness, Wm. H. Workman, that relates to acts done or statements made prior to the 28th of February, 1877, defendant- objected as incompetent, immaterial, and irrelevant, and moved the court to have the same stricken out of the evidence in this cause for those reasons, which objection was overruled by the court. In accordance with the suggestions of the court and consent contained on page 25½ of this bill of exceptions, and to save the point as therein provided, the defendants except.

On cross-examination the witness further testified as follows:

I did not measure how far the Caledonia was swung, but
304 have stepped it off. The swinging was done in '77, when
they had it surveyed. I know it was swung, because I knew
where the old corners were & I know where the new ones are. The
north end was marked by stakes when originally surveyed, and the
new location was also marked by stakes, and this end was swung up
the hill about 75 feet. The northwest corner stake was not a stump
originally or at any time. I am positive of this. I would not swear
positive, but I am pretty certain. The north centre end stake was
neither a stub nor a stump, but a stake; saw but one stump on the
ground, and that was the centre stake at the discovery shaft.

I was not present at the time of the survey in '77, but was there a
short time afterwards, and then saw that they had swung the claim.

Q. My recollection is not very good.

I went upon the ground the other day at the request of Mr. Clag-
gett and some other parties, as he wanted me to go and look the
ground over. I saw the northwest corner stake, north end centre
stake, & northeast corner stake in 1876 of the Caledonia
305 mine, and neither of them was a stump or a tree. They were
all stakes. These stakes stood where they were placed until
the timber-cutters broke them off or pulled them up. I think the
southwest corner stake stands now very nearly where they did in
'76. I cannot tell now on which side of the trail it stood. The
southwest corner was not a birch tree in 1876; of that I am cer-
tain—as certain as I am of another fact to which I have testified.

On redirect examination the witness further testified as follows:

Mr. Clagget asked me last Sunday at Lead City to go over and look at the ground and refresh my memory as to those stakes. I did not report to Mr. Clagget that the stakes had been swung at the north end.

306 P. A. GUSHURST was then called as a witness on the part of the plaintiff and testified as follows:

I have been [a] grocer at Lead City since 1876, and have been an owner in the Oro Fino mine. The discovery shaft of that mine is about 150 feet from the Caledonia north-end line. I first became acquainted with the Caledonia in the early part of the winter of 1876 & '7, and went down into the discovery shaft; the first time I was down in it was in February, '77, about the 20th, and the next time about the 1st of March. There was there Mr. Curlin, Mr. Manning, and probably Mr. Lynch. It was after the 1st of March that I became interested in the Oro Fino. I noticed while down in the shaft a ledge about 8 feet wide—a ledge of quartz apparently between t-o wall-rocks—and I thought by the way it ran out of the Caledonia ground it was pitching off in the direction of the Oro Fino, west and north of the discovery shaft; so I commenced to look around
for adjoining property and saw the owners of the Oro Fino,
307 Charles E. Barney and William Workman, and made a con-

tract with them about the 16th of M'ch, '77, to sink 20 feet on it. (Here witness produces a paper and examines, purporting to be said contract.) This paper has been in my possession ever since, and to-day is the first time that I have shown it to any one. I think it was about 2 or 3 weeks before I made this contract that I was down in the Caledonia shaft. Workman was living at Lead City at that time, about 100 rods from me, and he had been working on the Oro Fino up to the time that I made the contract. I was over there several times myself in Feb. & March before I went to work on this contract. I was at the Oro Fino shaft two or three times a week, and could see the discovery shaft of the Caledonia from where I passed over the trail. It was between the 20th and the first of M'ch that I was down in the Caledonia shaft. I was over the trail two or three times a week before this during the winter, but I don't remember of any one working there before Jan. or Feb., but they were at
308 work there before I went down into the Caledonia shaft. I will not be positive, however; my impression is now that I went down the shaft the second time between the 1st and 15th of March. They worked there in March; were working there while we were working on the Oro Fino. I never saw but one stake, and that was during the months of Feb. & March. It was the northwest corner stake; Mr. Workman showed it to me. I saw the present northwest corner stake about a year ago; it stood there father up the hill than when I saw it the first time—some 50 or 60 feet. By this change they run the side lines of the Caledonia up on our ground more. I called Lackey's attention to this change, and we went over together to the northeast corner stake, where I told him that stake was not where it stood when I bought into the Oro Fino. This was in May, '78. I never saw that stake there before; Lackey pointed it out to me. I have a memorandum of the time that I let the contract to sink the 20 feet on the Oro Fino. I let in on March 22d, 1877, to Wm. Radick and John Hall at seven dollars per foot, and they went to work immediately afterwards.

309 To all of which testimony of the witness, P. A. Gushurst, that relates to acts done and statements made prior to the 28th of February, 1877, defendant objected as incompetent, immaterial, and irrelevant, and moved the court to have the same stricken from the evidence in this cause, which objection was overruled by the court and the motion denied. In accordance with the suggestions of the court and consent contained on page 25½ of this bill of exceptions, and to save the point as therein provided, the defendant excepted.

On cross-examination the witness further testifies as follows:

310 Q. 1. About how often did you visit the Oro Fino shaft during the month of February?

A. Two or three times, probably.

Q. 2. What occasion did you have for going there?

A. I wanted to get into the ground; Workman was working there, and he brought home three or four specimens and told me he got them there; I went to see the place.

Q. 3. About what time was that in February that you went there first?

A. I would think it would cover pretty near the whole month. Workman was putting in time there pretty near all the month.

Q. 4. Did he work any for you during the month of February?

A. No, sir.

Q. 5. Did you send him there to do any work in the month of February?

A. No, sir; he was sinking a shaft.

Q. 6. Can you recollect with any degree of definiteness the number of visits you made to that shaft in the month of February and the time that you made those visits?

A. No, sir; I cannot.

Q. 7. What were you engaged in about the 15th of February?

A. Keeping store. I used to go along the trail two or three times a week, but then would not go to the ground.

Q. 8. Did you keep books at your store?

A. Yes, sir.

311 Q. 9. Kept a blotter?

A. Well, at that time, I had a kind of a blotter and ledger combined.

Q. 10. Did you keep a memorandum of the little transactions that took place in your book or blotter during that month?

A. Yes, sir.

Q. 11. Did you note down any of those visits to the Oro Fino discovery shaft?

A. No, sir.

Q. 12. Did you note down those visits to the Caledonia shaft?

A. I think not; no, sir.

Q. 13. Well, what circumstances is it that you now recall that is fresh in your recollection that enables you to fix the time that you went down into the Caledonia shaft—as from the 20th of February until the first of March?

A. Well, sir, I went down there in February, as I said. I thought the Caledonia was not staked right—that is, with the way the ore seemed to lay—and I looked around for adjoining property to see if I could not get an interest in it, and I spoke to Charles E. Barney and Workman about getting in there; they were in favor of my going in, and Barney wanted me to do 50 feet of work, and I went over and went down the Caledonia shaft to see how hard the rock was, and I came

312 to the conclusion it was pretty hard rock and it would cost too much money, and *that* I went on for a couple weeks, probably longer, and Mr. Barney came in one day and asked me whether that thing was dropped. I told him yes; I could not stand sinking fifty feet in that rock; it would cost ten or twelve dollars a foot. He says: "Fuss, if you will sink 20 feet I think Bill will be satisfied—that is, Workman—I will give you an interest." I says "All right." He says, "We will draw up the papers;" and we drew them that day.

Q. 14. And signed them that day?

A. Yes, sir; I think so.

Q. 15. Do you know?

A. Yes, sir; we signed them that evening. I sat right down there and drew out the documents.

Q. 16. Can you recollect any matter that you have now in your remembrance that will fix the date that you went down into the Caledonia shaft with more certainty than you have?

A. With more certainty? Nothing more than between the first time I went down the shaft and the time I drew up this contract Workman brought me rock on several occasions, and I prospected it from the Oro Fino.

Q. 17. You say you were there two or three times in the month of February?

A. Yes, sir.

Q. 18. How many times were you there from the first of Feb-
313 ruary until the 16th of March—that is, at the Oro Fino shaft?

A. I remember of two.

Q. 19. Do you remember of any more?

A. No, sir; not positively. The first time I went over there was a few days before the 16th; I went over to tell the Caledonia boys we were working on the discovery shaft; that I intended to get into that ground, and asked them if there was any litigation on it; they told me, as far as they knew, there was not. I told them I did not want to go into litigation, and if they knew of anything to let me know. They said some boys had been working there, but I did not interfere with their ground.

Q. 20. How do you know that Workman worked right along during February and March?

A. He brought me rock.

Q. 21. Haven't you just stated a moment ago that you only remember being there twice?

A. Yes, sir; I said I was there two or three times in February; he was working there; he brought me rock several times; he went by my store or cabin—it was nothing but a cabin—in going to work.

Q. 22. You took it for granted he was working there?

A. Yes, sir.

Q. 23. You don't mean to say you have knowledge that he was working every day in February?

A. No, sir; I don't think he was working very hard; the
314 shaft was down 11½ feet when I took it.

Q. 24. When was that Ore Fino located?

A. October 6th.

Q. 25. Does it conflict with the Bobtail claim location?

A. I believe it does.

Q. 26. You are interested in the result of this suit to some extent as against the Bobtail?

A. I don't know.

Q. 27. Well, you are interested in defeating the Bobtail, are you not, to the extent of this conflict with the Oro Fino?

A. Yes, sir.

Q. 28. Who are the owners now of the Oro Fino?

A. Charles E. Barney, William Workman, and myself.

Q. 29. Workman is also an owner now, is he?

A. Yes, sir.

Q. 30. During the two days or the two occasions that you went over that way in February that you remember of, do you state positively that there were men working at the Caledonia shaft on both occasions?

A. Not positively.

Q. 31. Was it on one of those occasions that you went down into the discovery shaft of the Caledonia?

A. Yes, sir; they were working there right along, but I would not state positively that I saw them.

Q. 32. Well, after that visit that you went into the bottom
315 of the Caledonia shaft between the 20th and the last of February, how often did you again visit the Oro Fino shaft before the date of the contract?

A. From the last of February.

Q. 33. Yes, sir; well, from that visit that you went down into the shaft, how often did you visit the Oro Fino discovery?

A. Two or three times; I went down in the Caledonia shaft between the 1st and 16th I remember now.

Q. 34. Can you give it any nearer than the 1st to the 16th?

A. No, sir; I only went down twice. I went down the second time to satify my first impression on the way the ore ran.

Q. 35. How long was that before you made this contract?

A. A few days.

Q. 36. As much as a week before?

A. Within a week, I would think.

Q. 37. Was Workman working there at that time?

A. When I started to go in there he kind of let up for awhile—kind of cleaned out the shaft.

Q. 38. As a business man, is that as near as you can come to fixing the times at which you made these visits over there to the Caledonia shaft and the Oro Fino shaft?

A. I think it is; it is a long while to think back.

316 Q. 39. Have no business transactions on your books that you can refer to to fix it with any greater degree of certainty, have you?

A. Well, I commenced to furnish the boys goods that took the contract the 19th of March.

Q. 40. You have got that down, have you?

A. Yes, sir.

Q. 41. Barney and Workman took the contract from you that you had contracted to do the work from them?

A. No, sir; John Hall & William Radick.

Q. 42. How long did they work there?

A. They did ten feet and then threw it up. We let the contract then to another party.

Q. 43. How long were they working there?

A. They were working there until along about the first week in April. There was a snow-storm come that delayed them some.

Q. 44. What direction [did] the Oro Fino claim run from the discovery shaft?

A. Of the what?

Q. 45. Of the Oro Fino.

A. It runs 15° east of north—very near north and south.

Q. 46. How far does it run north and how far south of the discovery shaft?

A. Seven hundred and fifty feet each way.

Q. 47. Does it cover some of the ground claimed by the Caledonia as well as some of the ground claimed by the "Bobtail?"

A. Yes, sir; it is staked across the Caledonia.

317 Q. 48. You have no controversy, though, with the Caledonia?

A. They have staked upon our ground.

Q. 49. You seem to have a perfect understanding with the Caledonia owners.

A. Not much.

Q. 50. Well, you are interested with them in defeating the Bobtail?

A. Well, I think it would be a kind of mutual benefit. The Bobtail boys kind of went back on me.

Q. 51. Is that the reason?

A. Well, not exactly; but I don't think I have anything to gain from the Bobtail.

On re-examination the witness further testified:

Q. 1. The times that you went over to the Oro Fino shaft when Workman was working, was any one working with him, or was he working alone in February and March?

A. Yes, sir; he was working alone.

Q. 2. What time did this big snow-storm occur that delayed the sub-contractors under you?

A. I think it was in the last part of March or April.

Q. 3. Is that about as definite as you could get to it?

A. Yes, sir; it was during the time that Hall and Radick had our work.

Q. 4. Well, before that was the weather good up to the time of that big snow-storm in March?

A. Pretty fair.

318 JOHN O'NEIL was then called as a witness on the part of the plaintiff and testified as follows:

I was living at Gayville on the 1st of January, '77, until the 20th of February, '77, when I moved up to Goldfinch gulch. I was at the Caledonia shaft on the 13th of Feb'r., and fixed the date by the time I went to Lead City to see a Mr. Canty, who was hurt. No one was at work at the time, but I could tell from the dump that men had been to work there, and I met them on the way, on the flat right opposite the old Bobtail shaft, about 400 feet away, as they were going to Lead City. They had their digging cloth-s on, dirty with red ore. The work at the shaft was fresh and the tools were there at the time.

I passed by there again the 8th or 9th of March, just after a snowstorm, and from the appearance I thought they had been windlassing just before I came in sight. I think it was Jimmy Lynch, but would not be certain. The men I saw on the 13th of Feb-
319 ruary coming away from the Caledonia shaft were Michael Heffron and Robert Curlin.

To all of which testimony of the witness, Joh- O'Neill, that relates to acts done and statements made prior to February 28th, 1877, defendants' counsel objected as immaterial, incompetent, and irrelevant, and moved the court to have same stricken from the evidence in this cause, which objection was overruled and the motion denied by the court. In accordance with the suggestions of the court and the consent contained on page 25½ of this bill of exceptions, and to save the point as therein provided, the defendants except.

320 J. H. BRIGGS was then called as a witness on the part of plaintiff and testified as follows:

I live in Terraville, on Bobtail gulch, and know J. B. McKinnis, who is my son-in-law; he is now in Denver. I was living here in '77. McKinnis, when he went away, left his books of account with me. (Here witness identified the day-book and blotter.)

It is here admitted in open court by counsel on both sides that the mining records of the Whitewood quartz mining district and all the records in the register of deed'- office of Lawrence county were destroyed in the fire in the town of Deadwood on the 26th of September, '79.

Plaintiff's counsel now offers in evidence a copy of the mining rules and regulations of the Whitewood quartz mining district, contained in a printed pamphlet entitled Golden Terra Mining Company against A. J. C. Mahler *et al.*, as the same appears on pages 39 to 44, inclusive.

321 To which the defendant counsel objects, not as to their being secondary, but to their competency, relevancy, and materiality, as upon their face *their* purport to be rules and regulations to govern the locations of mining claims and miners within a certain district or territory which at the time of their adoption was a part of the Sioux Indian reservation.

Which objection was overruled by the court, and they were admitted subject to the condition indicated by pl'ff's counsel to the court, viz: That the plaintiff is to show, either by the evidence already induced or by that which is to follow, or by both, that these mining rules and regulations were recognized and in force after the 28th of February, 1877, in said district; to which ruling defendant, by his counsel, then and there excepted.

The rules and regulations so offered in evidence by plaintiff's counsel are as follows:

322 *Mining Laws.*

Laws of Whitewood quartz district.—In accordance with a notice published in the Black Hills Pioneer on the 9th day of December,

1876, and with other notices posted in conspicuous places before and after advertising above, of which notice the following is a copy.

Notice is hereby given that a meeting of the quartz miners of Whitewood district will be held at Gayville on the 29th day of December, A. D. 1876, at 2 o'clock p. m., at the house of Thomas Campbell, for the purpose of making local and general laws.

It is of vital importance that all those who have any interest in that respect should be present.

Whitewood district is that portion of the Black Hills which embraces Whitewood creek and all its tributaries.

T. H. CARR, *Recorder.*

The meeting convened in pursuance to call of notice at 2 o'clock p. m., at the house of Thomas Campbell, at Gayville, in the Black Hills, D. T.

On motion of T. H. Carr Mr. D. E. Castigan was elected temporary president of the meeting. On motion of John M. Murphy
323 Mr. T. H. Carr was elected temporary secretary of said meeting. On motion of S. P. Bomans Mr. D. E. Castigan was chosen permanent president of said meeting, and Mr. T. H. Carr was chosen permanent secretary of said meeting.

On motion carried: That a committe of five be appointed by the president to draft local and to adopt general laws for this district.

The committe appointed by the president consisted of the following-named gentlemen present: John M. Murphy, chairman; S. P. Bomans, John Bell, Henry Spence, and George L. Houghton, who were instructed to report at adjourned meeting on December 30th, 1876.

On motion carried: That this meeting do now adjourn till the 30th day of December, 1876, at same time and place.

(Signed) D. E. CASTIGAN, *President.*
T. H. CARR, *Secretary.*

GAYVILLE, D. T., *Dec.* 30, 1876.

Meeting convened in pursuance of adjournment of December 30th, 1876, and the committe appointed by the president presented
324 their report in writing, and which was thereupon read to the meeting. On motion the laws framed by the committee became the property of the meeting, and committee be discharged. Carried.

On motion, that the laws be read and acted upon by sections. Carried.

Be it enacted by the quartz-miners of Whitewood mining district, in mass-meeting assembled, December 30th, 1876, the following laws, rules, and regulations governing the locations of quartz claims in said district, to wit:

SEC. 1. Whitewood district shall consist of all that section of country drained by Whitewood creek and tributaries. Carried.

The officers of Whitewood district shall consist of a recorder and secretary. The recorder to be *ex-officio* secretary, and shall keep the records of all meetings. Carried.

SEC. 2. We hereby adopt the United States mining laws of May 10, 1872, with acts — amendments thereto, with the following and local rules and requirements. Carried.

SEC. 3. From and after the approval of these laws all citizens of the United States of lawful age, and those who have declared
325 their intentions to become such under the regulations specified by law shall have the right to locate claim- in Whitewood mining district upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnebar, lead, tin, copper, or other valuable deposits. Carried.

SEC. 4. A mining claim located after the adoption of these laws, whether located by one or more persons, may equal, but shall not exceed, 1,500 feet in length along the vein or lode. No claim shall extend more than 150 feet on each side of the middle of the vein at the surface. The end lines of each claim shall be parallel to each other. Carried.

SEC. 5. In order to entitle any person or persons to record any lead, lode, or leads of quartz claims, either of gold, silver, cinnebar, lead, tin, copper, or other valuable deposits, there shall first be discovered a vein, lode, or mineral deposit lying in place upon the ground claimed. The said claimant or claimants shall place a post or monument at each corner of the land claimed, also a post or monument at each end of the land claimed, marking the centre of the land claimed; also a post or monument at the centre
326 of each side line; also at discovery shaft a stake or board upon which shall be designated the name of the lode or claim, the name or names of the locators, the number of feet of ground claimed, and in which direction from the point of discovery, and the number of feet claimed on each side of the vein or crevice, and such a description of the claim, by reference to some natural object or permanent mound, as will identify the claims, such as prominent but-es, the confluence of streams, and other land-marks in the vicinity of the mine. Carried.

SEC. 6. A copy of a location notice of a mining claim, tunnel-site, or mill-site shall be handed to the recorder of this district within 20 days from the posting of said notice on the claim, or the location shall be held as abandoned. Carried.

SEC. 7. In order to hold a possessory right to a claim there shall be not less than one hundred dollars' ($100) worth of work done thereon during each year, and in performing such labor 500 cubic feet in picking ground and 125 cubic feet in blasting rock shall be estimated as one hundred dollars. Carried.

327 SEC. 8. It shall be the duty of the recorder to call meetings of the quartz miners of this district whenever a petition is handed him signed by ten or more persons owning quartz claims in this district, on the legal representations of such quartz-claim owner, requesting him to give notice of such meeting for the purpose of altering or amending the laws of this district, or for the election of a quartz recorder, and such notices shall be posted in at least five conspicuous places in the district for at least ten days previous to the meeting, and it shall be the duty of the recorder to record all

location notices upon the payment of his fees. He shall have the right to appoint one or more deputies, and shall be entitled to the following fees: For recording quartz claims, mill-sites, and tunnel rights, each two dollars; and for deeds, bonds, motgages, and other instruments of writing, one dollar for each folio, and fifty cents for each additional folio, and certified copies of location notices shall be furnished for one dollar each.

Amendment to Sec. 9.

328 On motion that [at] any meeting hereafter called it shall require a two-thirds majority of the quartz miners present to decide any measure before said meeting.

(Sec. 9 adopted as amended.)

SEC. 9. The district recorder is hereby authorized to administer oaths or affirmations when the mining laws of the United States require the same relating to mining purposes. Carried.

SEC. 10. The present recorder, T. H. Carr, is hereby declared elected recorder for the year ending December 31st, 1877. Carried.

SEC. 11. The records are hereby declared to be the property of the district. The recorder shall turn over to his successor in office, and in the event of the organization of a county in this district he shall turn over to the recorder of the county all the records of his office when such county organization is completed. Carried.

Committee: John M. Murphy, chairman; Henry Spencer, S. P. Bomans, John Bell; George L. Houghton, secretary.

329 We hereby certify that the above laws were adopted by the miners, in mass meeting assembled, section by section, December 30th, 1876, to take effect from this date.

D. E. CASTIGAN, *President.*
T. H. CARR, *Secretary.*

SEC. 12. At a meeting held by the quartz miners of Whitewood quartz mining district in Gayville, D. T., on the 6th day of March, A. D. 1877, the following resolutions were adopted, to wit:

Resolved, That we, the quartz miners of Whitewood quartz mining district, in mass meeting assembled, re-enact and legalize the laws heretofore passed and adopted in this district, and that Th's H. Carr, the present recorder, be elected and is hereby declared recorder of this district for one year from this date.

S. P. BOMANS, *Chairman.*
GEO. L. HOUGHTON, *Secretary.*

SEC. 13. At a meeting held by the quartz miners of Whitewood district on the 15th day of May, A. D. 1877, the following
330 resolutions were adopted, to wit:

Be it enacted by the quartz miners of Whitewood mining district, in mass meeting assembled, That the quartz recorder of said district is hereby authorized to turn over all records, laws, papers, and documents belonging to said office to the recorder of deeds of Lawrence county, D. T., within thirty days from date, and the recorder is requested to take receipts for the same when delivered.

S. P. BOMANS, *Chairman.*
T. H. CARR, *Secretary.*

SEC. 14. T. H. Carr, Esqr.—SIR: Your petitioners would respectfully ask that a meeting of the quartz miners of Whitewood quartz district be called in conformity with section (9) of the laws of said district for the purpose of changing a portion of section twelve (12) of said laws and for the transaction of such business as may legally come before the meeting.

Gayville, April 30th, 1877.

Signers of the call: W. M. Bull, James Ryan, John Sinclair,
331 W. H. Reed, E. F. Gallaher, M. Goldman, L. P. Elliott, D. Jones.

In compliance with the foregoing petition, the following notice was given:

May 25, A. D. 1877.—To all whom it may concern: Notice is hereby given that a meeting of the quartz miners of Whitewood district will be held at the house of Thomas Hanley, in Gayville, on the 8th day of June, A. D. 1877, at 7 o'clock p. m., to transact important business relative to the records of Whitewood district.

The meeting convened in pursuance to public notice and J. H. S Coleman was elected president and Wm. Lardner secretary.

On motion, that the following portion of section twelve (12), to wit, "and in the event of the organization of a county in this district he shall turn over to the recorder of the county all the records of this office when such county organization is completed," and the whole of section fourteen (14) be repealed. Carried unanimously.

J. H. S. COLEMAN, *Chairman.*
WM. LARDNER, *Secretary.*

332 Notice is hereby given that a meeting of the miners of Whitewood quartz mining district will be held in the house of Thomas Campbell, of Gayville, on the 7th day of September, 1877, at 7 o'clock p. m., for the purpose of electing a recorder to fill the vacancy caused by the death of the late recorder, Thos. H. Carr, who was killed by the Indians August 27th, A. D. 1877.

J. B. CARR.

Meeting convened in pursuance to call of notice and adjourned to the office of the deputy recorder, on placer claim No. 4 of Deadwood gulch, above Discovery.

On motion, J. B. Carr be elected recorder of Whitewood district for the year ending March 6th, 1879, or until his successor is duly elected. Carried.

W. H. BROWN, *Chairman.*
J. B. CARR, *Secretary.*

TERRITORY OF DAKOTA, }
County of Lawrence, Whitewood Quartz Mining District, } *ss:*

I, James B. Carr, being first duly sworn, deposes and says:
333 I am recorder of Whitewood quartz mining district, in Lawrence county and Territory of Dakota; that the above and

foregoing are true and correct transcript- of the laws of Whitewood quartz mining district, as they appear on file in record of Whitewood quartz district.

Dated this — day of ——, A. D. 187–.

—— ——.

Subscribed and sworn to before me this — day of ——, A. D. 187–.

—— ——.

334 LOUIS P. ELLIOTT was then called as a witness on the part of the plaintiff and testified as follows:

I first came to the Whitewood quartz mining district July 3d, 1876, and was engaged with one Thos. Hanley in the saloon business in Gayville. J. P. McKinnis was in the grocery business at Gayville in the spring and summer of '77. I knew Robert Curlin, James Manning, and James Lynch in Feb. & March of that year, and they were working on the Caledonia lode. The reason I know that is this: Manning and Curlin came to us and asked us to go security for some powder and fuse and other articles at McKinnis' store at that time, which we did, and the articles were charged to us. They paid for them themselves afterwards. We might have paid some of the bill ourselves. The bill amounted to about eighty dollars. This was about the first of Feb'y. I saw the entry charged to us from the 5th to the 20th, and I saw those books to-day. I do not remember whether we furnished any other parties with material or supplies at that time, but don't think we did. I was not an
335 owner in the mine at that time. I think I was on the Caledonia mine in the month of February. I use- to go over to Lead City every week or two, and generally went to see them. At these visits in February Manning and Curlin were working there.

I would not like to swear whether I was there in March or not; I was back and forth while they were at work, but whether it was in the month of March or not I cannot tell. I went up once in Feb'y with a man named James Burns. The boys were then at work. I don't know of any work being done there before we furnished the tools, and think they must have worked there a month and a half or two months. I never saw Jimmy Lynch at work there, and don't remember who did the windlassing; I think the two men were on top when I was there, and I know Manning showed us some of the rock.

I remember the flurry here about rerecording claims on account of the Indian reservation. I was not on the Caledonia claim
336 about that time. I got an interest in the claim from James Manning shortly after the settlement of the Indian reservation.

To all of which testimony of the witness, L. P. Elliott, that relates to acts done and statements made prior to the 28th day of February, '77, defendants' counsel objected as incompetent, irrelevant, and immaterial, and moved the court to have the same stricken from the evidence in this cause, which objection was overruled by the court and motion denied.

In accordance with the suggestions of the court and consent contained on page 25½ of this bill of exceptions, and to save the point as therein provided, the defendants except.

On cross-examination the witness further testified as follows:

I did not see the entry made in McKinnis' books at the time that the articles were furnished, and I do not know whether the entry is correct or not. I saw Curlin and Manning at work soon
337 after the articles were got. I cannot tell whether they were interested in any other claim except the Caledonia at that time, but presume they were. I do not know of my own knowledge that they worked anywhere else. I was there 2 or 3 times in Feb., but did not see Jimmy Lynch, and don't think he was working there at all. Curlin and Manning were working then in the old discovery shaft, which was then 40 or 50 ft. deep. When I was there it was about noon and they were eating their dinner. I took it for granted that they were working.

338 J. M. MURPHY was then recalled on the part of the plaintiff and testified as follows:

The Caledonia claim was located anew in March, 1878, and a relocation certificate was filed in the office of the register of deeds of this county at that time. I got the field-notes from Mr. Smith of his survey and drew the notice, as I was acting as the attorney for the Caledonia company at that time. Smith gave me a copy of his field-notes of the survey of the Caledonia made in the fall of '77 and I copied that. He had written out the certificate with the exception of the two last clauses in it, which I wrote. (Witness here handed a paper purporting to be a copy of the certificate of relocation of the Caledonia lode, dated March 2d, 1878.) I know nothing about the accurateness of the field-notes given my by Mr. Smith. The members of the company in Feb'r. and March, '77, were Henry Lackey, Peter O'Neal, Michael Heffron, Michael Lynch, L. P. Elliott, J. M. Murphy, and, I believe, John Morrow. I did not see any of
339 them working on the mine in Feb'y and March of that year. They were working for themselves and they worked for me. James Lynch was working for his brother, Michael Lynch.

To all of which testimony of the witness, J. M. Murphy, that relates to acts done or statements made prior to the 28th day of Feb., 1877, defendants' counsel objected on the ground that the same was irrelevant, incompetent and immaterial, which objection was overruled by the court.

In accordance with the suggestions of the court and consent contained on page 25½ of this bill of exceptions and to save the point as therein provided, the defendant- except.

340 W. L. SMITH was then recalled as a witness on part of plaintiff and testified as follows:

(Witness handed a paper purporting to be a copy of the location certificate of the Caledonia lode, dated March 2d, 1878.)

There is a mistake in the course here running from corner No. 6 to corner No. 1, in this, that there is substituted a bearing to a prominent mountain peak instead of a bearing of an end line. The effect of this will be that if a person undertakes to plat the lode from these field-notes he would not be able to make it close. If a person went upon the ground with these field-notes to retrace this survey to the points here he would not close on the ground either; he would not come back to the starting point; but with the field-notes and the monuments on the ground it will bring you to corner No. 6, southeast corner, all right—that is, from corner No. 1, southeast corner, it would bring him to the northwest corner all right; from there it would run you off in entirely another direction; it would run
341 you north 30° west, instead of south 88° 20- east, or north 88° 20- east. (Here plaintiff offer- in evidence paper referred to, purporting to be the new location of the Caledonia lode, containing field-notes of survey, dated March 2d, 1878, signed by James Lynch, Michael Hefron, Henry Lackey, Robert Curlin, Peter O'Neal, James Manning, John M. Murphy, Louis P. Elliot, & John Morrow. Filed in the office of the register of deeds of Lawrence county, at 3 p. m., March 2d, 1878, and recorded in book 13, page 292, of the record of said office, and which is in the words and figures following, to wit: And to the introduction of which as evidence defendants' counsel objected on the ground that the same was irrelevant, immaterial, and incompetent, which objection was overruled by the court. In accordance with the suggestions of the court and consent contained on page 25½ of this bill of exceptions, and to save the point as therein provided, the defendants except.)

342 TERRITORY OF DAKÓTA, } ss:
Lawrence County, }

Know all men by these presents that the undersigned, having complied with the local laws, customs, and regulations, and the mining act of Congress of May 10th, 1872, have located 1,500 ft. linear and horizontal measurement on the "Caledonia" lode, along the vein thereof, with all its dips, spurs, veins, lodes, and ledges, with 150 feet in width on each side of the middle of said vein at the surface, with the surface ground within the lines of said claim, 500 feet on said lode, running southeasterly from the centre of discovery shaft, and 1,000 ft. running northwesterly from the centre of said discovery shaft, situated on the east side of Shoemaker gulch and south side of Bobtail gulch, about 1,500 feet from its confluence with Deadwood creek, and about 2,000 feet south of Central City, in Whitewood quartz mining district, Lawrence county, Dakota Territory, described more particularly by field-notes of survey, as follows to wit:

Commencing at a stake for corner No. 1, being the S. E. cor. from which the N. W. corner stake of Minnie Tunnel site brs. N. 32° 30' W., and Mammot Tunnel site brs. N. 50° 45' W., and prominence mountain peak brs. N. 50° 15' E. (var. 15° 30' east), and
343 prominent mountain peak brs. S. 72° 45' W.; thence N. 1° 40' W. 500 ft. to a stake for corner N-. 2; thence 16° 30' W. 1,000

ft. to a stake for corner No. 3, from which dead pine tree 14 inches bears N. 21- E. 26 feet, and pine tree 10 inches S. 55° W., and prominent mountain peak brs. N. 0° 30′ W.; thence N. 10° E., and prominent mountain peak brs. S. 88° 20′ W. 300 feet to a stake for corner No. 4; thence S. 16° 30- E. 1,000 ft. to a stake for corner No. 5; thence S. 1° 40′ E. 500 ft. to a stake for corner No. 6, from which a pine tree 12 inches bears N. 33° 30- E. 23 feet, and a pine tree 12 inches brs. S. 9° 30′ W. 22 ft., and a prominent mountain peak bears N. 2- west, and a ledge of rocks in place bears N. 73° 30′ E.; thence N. 88° 20- E. 300 ft. to the place of beginning. Mines in the vicinity: "Clara No-. 1 and 2," "Queen of the West," "Goldfinch," and "High Lode."

Field-notes of survey in office of Smith and Ankeny, Deadwood, for further reference.

This location is made at a relocation of said "Caledonia" lode, and of the boundaries established by a survey of the same
344 made by Smith [&] Ankeny on Nov. 14, 1877, which said survey established the lines of said lode as above described, and which said lines were the same as when said claim was first located, and as the same has been claimed and possessed by the owners of said lode ever since.

This location is a new location without waiving any rights under previous locations or possessory rights of said lode, and is made by the undersigned for their benefit in the proportions in which they own their respective interest- in said Caledonia mine at the date hereof, the undersigned being the present owners thereof.

This claim was first located June 15th, 1876; date of the present location, March 2d, 1878.

Whitewood mining district, Lawrence Co., D. T.

JAMES LYNCH.
MICHAEL HEFFRON.
HENRY LACKEY.
ROBERT CURLIN.
PETER O'NEILL.
JAMES MANNING.
JOHN M. MURPHY.
LEWIS P. ELLIOTT.
JOHN MORROW.

TERRITORY OF DAKOTA, } *ss:*
County of Lawrence, }

I, C. H. McKinnis, register of deeds in and for said county,
345 in the Territory of Dakota, do hereby certify that the foregoing is a true and correct copy of the original as the same appears of record in book 13, page 292, of the records of this office. Filed at 3 p. m., March 2d, 1878.

Witness my hand and official seal this the 12th day of August, A. D. 1878.

C. H. McKINNIS,
Register of Deeds.

I have interlined the error in lead pencil in this copy as indicated, and, with this exception, it corresponds with my field-notes.

On cross-examination the witness testified as follows:

This is not a correct copy of the field-notes of my survey. I am positive of that, but I do not understand that there was anything improper in the parties changing the field-notes when they filed this last location notice in March, '78, if they desired. I do not
346 know that there was anything binding upon them by that. They could have run the claim off in another direction if they wished, and they might if they desired have run the claim in a different direction in March, '78, from my survey, but they could not if they followed my field notes. I think any ordinary civil engineer and surveyor going upon the ground with this copy of my field-notes could, without the aid of monuments upon the ground, follow out the lines just as I surveyed them. He would see the mistake that the south end line as given in this copy was not parallel with the north end line. As we understand the law the end lines must be parallel. The surveyor would run by this copy from the southeast corner north 30° and that is the true course as marked on the map here in court. The var. would be 15° 30′ east the side lines as laid down on that map here in court, and as given in this copy are the same. The side lines in both run 1° 40′ west and the course as given is north 1° 40′ west in both. The mistake is
347 in the course from the corner marked No. 6, or the southwest corner to corner No. 1, and this mistake would run the south end line as given in these notes north 30° east.

I explain that that runs the end line 1° 40′ west, and the mistake given is in the south end line, and the only mistake in the description in this copy is the closing end line from post No. 6 to post No. 1, a distance of 300 feet, and any person closing the lines would observe the error.

I think it is a mere clerical error. The error is in the last closing course of the survey. I do not know whether the Caledonia has been swung or not.

In my survey I ran from the discovery in a southerly direction within about 50 feet of the black stump. I did not go to the stump. This stump was the only monument that I found marking the boundaries of the Caledonia claim.

348 GEORGE KENNEDY was then called as a witness on the part of the plaintiff and testified as follows:

In February and March, '77, I was living in Gayville and knew the Caledonia claim and some of the parties who owned in it—Manning, Curlin, and Elliott. About the latter part of Feb. or 1st of March Mr. Elliott and me went over to Lead City; passed along by the claim—I could not tell the time exactly; we passed right by the discovery shaft; we saw Mr. Manning there, who was the only one I recollect of seeing; he was on the dump at the time, not doing anything—more below, I presume; there was a windlass over the shaft, and the appearance indicated that they were working. I could

not tell whether the tub was above or below. The way I fix the date of our visit is this: Very shortly afterwards I started down to Rapid creek, along about the 10th or 12th or 20th of the month, probably, and about the 20th of April they were building a cabin down there on Rapid, and we had a very big snow-storm that
349 I know of, and this occurrence must have been a couple of weeks before. I am positive that we had that snow-storm about the 20th of April, and that this visit to the Caledonia was at least a couple of weeks before.

On cross-examination the witness further testified as follows:

In the month of February, '77, I was engaged in doing nothing, and I thing James Manning and Robert Curlin were engaged in the same business in that month. I saw them around Gayville; Manning was stopping there, I believe; I cannot recall any particular day during the month of February, '77, that I did anything or had something done. I do not remember what day that I had the work done on my own claim first. I only passed over once to Lead City with Mr. Elliott by the Caledonia. I think it was along the latter part of February or first of March; I think from the 25th to
350 the last of the month. On the 20th I was in Gayville or South Bend, doing nothing; if I remember rightly, I had nothing to do. I do not know the day I started for Little Rapid, but I can guess within 3 or 4 days of it. I was there 3 or 4 days before the snow-storm, and I walked down from here in one day; I started down between the 15th & 20th, I think, and on the 3d or 4th day after I got down we started to build the cabin. I think now that the snow-storm was about the 19th or 20th of March. I had no interest in the Caledonia. I have talked about this just like any one would talk about a suit, but then that's nothing.

On re-examination the witness testified as follows:

I remember the flurry that was here about the time of the news that the Indian reservation was removed, and it was a day or two after that, or a few days after, that I went down to Little Rapid.

351 A. J. RIGBY was then called as a witness on the part of plaintiff and testified as follows:

I am the superintendent of the Caledonia Mining Company, and first became acquainted with the Caledonia mine August 18th, 1878. I first came here in June of that year. I was here when Mr. Bell purchased the Caledonia mine, at which time there was work going on in an open cut, which is represented on the map. There was very little work being done at the time. A cut and tunnel had been run in at that time. I saw the west centre stake and the discovery stake and the southwest corner stake. The parties then were Mr. Lackey, Mr. O'Neal, and James Lynch, I think, and they sold out to Mr. Bell. There were 4 or 5 of them altogether. After the sale was made to Mr. Bell I was appointed superintendent—that is to say, I was engaged by Mr. Gashwiler on the 18th of August, 1878, and as soon as

the present company was formed I was appointed superintend-
352 ent, and have remained in possession ever since. At the time that the mine was sold by Mr. Bell to the Caledonia company I had possession of it for Mr. Gashwilder. Considering that I was in Mr. Gashwilder-'employ until I received my appointment regularly from the secretary's office, Mr. Bell bought for the Caledonia company, and Mr. Gashwilder represented Mr. Bell in this purchase.

The following question was then asked of the witness:

Q. What would you say is the value of that discovery shaft and that open cut and the other work upon the Caledonia claim at the time Mr. Bell purchased, exclusive of the costs of building the road to Gayville?

To which question defendants' counsel objected on the ground that the same was incompetent and immaterial, which objection was overruled by the court, and to which ruling defendants' counsel excepted.

Answer. I did not examine the work for the purpose of estimating its value at that time, but I would estimate it as exceeding
353 three thousand dollars in value.

Q. Since you took charge of the mine what is the value of the work done upon it?

To which question defendants' counsel objected, on the ground that the same was incompetent and immaterial, which objection was overruled by the court, and to which ruling defendants' counsel excepted.

Ans. It would be about $200,000.00 exclusive of the purchase price and of other titles purchased.

On cross-examination the witness further testified as follows:

Q. How much profit has been realized?
Ans. Not any.

354 THOMAS S. O'ONEIL was then called as a witness on the part of plaintiff and testified as follows:

I first became acquainted with the Caledonia mine the 15th or 16th of June, '76. I made a location in that vicinity myself in '76, called the "Empire," which covered about $\frac{2}{3}$ of the Caledonia, and I carefully observed the stakes of the Caledonia at that time. I saw the south centre end stake, which stood about 100 feet south of the discovery shaft of the Empire and 200 feet west. The southwest corner stake of the Caledonia was a birch stake or stump. The southeast corner was a stake. I never saw any of the north end stakes except the northeast corner, and that was a small tree. The stakes were blazed on the inside facing the claim and had inscriptions written upon them designating respectively what the stakes were. I saw these stakes the summer of '76 twice.

I left the hills on the 4th of November, 1876, and did not return here again until the 21st of April, '77. I again went
355 upon the ground 4 or 5 days after my return in company with

Judge Clagget to show him the location of the Empire, knowing that we were in conflict with other claims and I wanted him to investigate the matter. We went to the discovery stake and the east side line stake and the southern end stakes of the Caledonia, and on our way home we went by the northeast corner stake. I could not see any difference in the positions of the south end stakes, which I then pointed out to Mr. Clagget as compared with their old positions where I had seen them in the year 1876. They occupied the same relative positions. I did not notice change in the northeast corner stake. It was the same tree.

356 J. M. MURPHY, being recalled on the part of the plaintiff, testified as follows:

I was in the office of the Caledonia Gold Mining Company, in San Francisco, in the month of March last, and there I saw the seal of the corporation and had it in my hand, and saw impressions taken from it.

I have examined a certified copy of the appointment of Mr. Rigby, as the agent of the corporation, and the seal thereto; that has been introduced in evidence here and it is a correct impression of the seal of the corporation.

357 J. J. WILLIAMS was then called as a witness on the part of the plaintiff and testified as follows:

I first came to the Whitewood quartz mining district, Lawrence county, D. T., the 3d of January, 1876. I had no occasion to record any quartz claims prior to the 1st of July of that year, but afterwards had one recorded in '76. There was a mining custom here in '76 that was governed by a meeting held when the Whitewood quartz mining district was organized on the 22d of Feb'y, '76. About 15 or 20 miners assembled at my cabin here, where Deadwood now is, and they passed a resolution adopting the United States laws and the laws of the Territory of Dakota, and organized the Whitewood quartz mining district. E. B. Parker was elected mining recorder of that district, and my understanding is that he opened a recorder's office for recording quartz claims immediately thereafter, but do not know this of my own knowledge, as I had no business with him until later in the year.

358 (The witness here was asked the following questions:)

Q. Do you know anything about the custom of the miners to record with Parker and in his office during the year 1876?

Objected to by defendant on the ground that the same is incompetent, irrelevant, and immaterial. Objection overruled by the court, and to which ruling defendant, by his counsel, then and there excepted.

Ans. I know several claims that was located and I suppose recorded during that time. I never examined the books of the quartz mining recorder until October, '76, and I should judge there was then a good many claims recorded from the looks of the book. I

the present company was formed I was appointed superintend-
352 ent, and have remained in possession ever since. At the time that the mine was sold by Mr. Bell to the Caledonia company I had possession of it for Mr. Gashwilder. Considering that I was in Mr. Gashwilder-' employ until I received my appointment regularly from the secretary's office, Mr. Bell bought for the Caledonia company, and Mr. Gashwilder represented Mr. Bell in this purchase.

The following question was then asked of the witness:

Q. What would you say is the value of that discovery shaft and that open cut and the other work upon the Caledonia claim at the time Mr. Bell purchased, exclusive of the costs of building the road to Gayville?

To which question defendants' counsel objected on the ground that the same was incompetent and immaterial, which objection was overruled by the court, and to which ruling defendants' counsel excepted.

Answer. I did not examine the work for the purpose of estimating its value at that time, but I would estimate it as exceeding
353 three thousand dollars in value.

Q. Since you took charge of the mine what is the value of the work done upon it?

To which question defendants' counsel objected, on the ground that the same was incompetent and immaterial, which objection was overruled by the court, and to which ruling defendants' counsel excepted.

Ans. It would be about $200,000.00 exclusive of the purchase price and of other titles purchased.

On cross-examination the witness further testified as follows:

Q. How much profit has been realized?
Ans. Not any.

354 THOMAS S. O'ONEIL was then called as a witness on the part of plaintiff and testified as follows:

I first became acquainted with the Caledonia mine the 15th or 16th of June, '76. I made a location in that vicinity myself in '76, called the "Empire," which covered about ⅔ of the Caledonia, and I carefully observed the stakes of the Caledonia at that time. I saw the south centre end stake, which stood about 100 feet south of the discovery shaft of the Empire and 200 feet west. The southwest corner stake of the Caledonia was a birch stake or stump. The southeast corner was a stake. I never saw any of the north end stakes except the northeast corner, and that was a small tree. The stakes were blazed on the inside facing the claim and had inscriptions written upon them designating respectively what the stakes were. I saw these stakes the summer of '76 twice.

I left the hills on the 4th of November, 1876, and did not return here again until the 21st of April, '77. I again went
355 upon the ground 4 or 5 days after my return in company with

Judge Clagget to show him the location of the Empire, knowing that we were in conflict with other claims and I wanted him to investigate the matter. We went to the discovery stake and the east side line stake and the southern end stakes of the Caledonia, and on our way home we went by the northeast corner stake. I could not see any difference in the positions of the south end stakes, which I then pointed out to Mr. Clagget as compared with their old positions where I had seen them in the year 1876. They occupied the same relative positions. I did not notice change in the northeast corner stake. It was the same tree.

356 J. M. MURPHY, being recalled on the part of the plaintiff, testified as follows:

I was in the office of the Caledonia Gold Mining Company, in San Francisco, in the month of March last, and there I saw the seal of the corporation and had it in my hand, and saw impressions taken from it.

I have examined a certified copy of the appointment of Mr. Rigby, as the agent of the corporation, and the seal thereto; that has been introduced in evidence here and it is a correct impression of the seal of the corporation.

357 J. J. WILLIAMS was then called as a witness on the part of the plaintiff and testified as follows:

I first came to the Whitewood quartz mining district, Lawrence county, D. T., the 3d of January, 1876. I had no occasion to record any quartz claims prior to the 1st of July of that year, but afterwards had one recorded in '76. There was a mining custom here in '76 that was governed by a meeting held when the Whitewood quartz mining district was organized on the 22d of Feb'y, '76. About 15 or 20 miners assembled at my cabin here, where Deadwood now is, and they passed a resolution adopting the United States laws and the laws of the Territory of Dakota, and organized the Whitewood quartz mining district. E. B. Parker was elected mining recorder of that district, and my understanding is that he opened a recorder's office for recording quartz claims immediately thereafter, but do not know this of my own knowledge, as I had no business with him until later in the year.

358 (The witness here was asked the following questions:)

Q. Do you know anything about the custom of the miners to record with Parker and in his office during the year 1876?

Objected to by defendant on the ground that the same is incompetent, irrelevant, and immaterial. Objection overruled by the court, and to which ruling defendant, by his counsel, then and there excepted.

Ans. I know several claims that was located and I suppose recorded during that time. I never examined the books of the quartz mining recorder until October, '76, and I should judge there was then a good many claims recorded from the looks of the book. I

saw but one book. I don't know that I have knowledge of any quartz mining claim that was located here in 1876 that was not recorded.

359 At this point it is admitted by counsel on both sides that the following are the facts as they existed and may be found by the court as a part of its finding in this case, viz:

That on the 30th day of December the miners of Whitewood quartz mining district established said district and adopted the rules and regulations which have heretofore been admitted in evidence, and that prior thereto there was no custom, rule, or regulation concerning lode claims in force in the said district, except a custom of recording such claims in a mining recorder's office, but that said custom did not prescribe the time within which such record should be made. (See page 143 for mining laws referred to.)

360 MICHAEL LYNCH recalled on the part of plaintiff and testified as follows:

In March, 1878, I got a new location notice for the Caledonia mine from Mr. Clagget. I took it to Lead City and gave it to my brother, James Lynch, and he posted it on the tree by the discovery shaft. I saw it there the next day. I know of my own knowledge that that notice was recorded in the office of the register of deeds of Lawrence county.

To the best of my knowledge the value of the work done on the Caledonia claim from the 15th of June, '76, to the 28th of February, 1877, was worth seven or eight hundred dollars, and the value of the work done from the 28th of Feb., '77, until the 28th of Feb., '78, was worth more than $500.00, and between the 28th of Feb., '78, and the month of June following more than a thousand dollars.

I believe work was going on when this relocation notice of March 2d, '78, was posted, at which time we had a survey made of the Caledonia. This relocation was made to make our title better.

361 On cross-examination the witness further testified as follows:

This relocation was made at the suggestion of Judge Clagget, as there was some defect in our location before that in regard to the lines of Clara No. 2. The latter claim included our discovery 1, where all this work had been done. We did not change the boundaries in any respect.

The plaintiff- here rested their case, and the defendant, to maintain the issues on his part, introduced the following testimony:

362 In [the] District Court, First Judicial District.

CALEDONIA GOLD MINING CO.
vs.
JOHN NOONAN. } N-. 121.

TERRITORY OF DAKOTA, *County of Lawrence:*

Filed December 3d, A. D. 1881.

FRANK J. WASHABAUGH, *Clerk,*

Bill of Exceptions.

Filed this 27th day of July, A. D. 1882.

B. S. WILLIAMS, *Clerk.*

Defendant's Case, Book 2.

363 L. P. KELLOGG, a witness produced on the part of the defendant, testified as follows:

I came to Lawrence county on the 5th day of June, 1877. (Witness was here handed a small book, purporting to be a copy of book No. one of the Whitewood quartz mining district records, and recorded by E. B. Parker, mining recorder of said district in 1876.) I compared this book with book number one of the mining records. The recorder read from the original and I compared this copy with it as the original was read off, and attached my signature in several places to this copy. This is a correct copy of the original book as it was at the time of the comparison. This copy is the same now, and is correct in every respect, as it was when I compared it. As to the record of the Bobtail location I should say that it [is] the same as it was in the original, but I don't remember particularly about any of the locations. The comparison was made in the early part of 1878.

364 Here defendant offers the book in evidence to establish the record of the Bobtail lode location, as recorded in Feb., 1876, and which is in the words and figures following, to wit:

BLACKTAIL, *Feb.* 24, 1876.

Bobtail, lead situated on the left-hand fork of Bobtail gulch, Lost district, commencing at the northeast end of Gold Run lead, running 1,500 feet northeasterly course from the place of beginning; discovered Feb. 21st, 1876; located Feb. 24, 1876, by H. S. Ireton, T. E. Carey, D. G. Chizum.

On cross-examination the witness further testified as follows:

The comparison of this book with the original was made by me with James B. Carr, the mining recorder in the early part of '78, before he left the county. In some cases I examined the
365 original entries, but he read of- the original book and I followed the copy. I think this copy is in Mr. Carr'- handwriting.

366 J. D. MCINTYRE was then called as a witness on the part of the defendant, and testified as follows:

In the spring of '78 I was associated with Mr. Clapp in Deadwood as a partner, as mining engineers and surveyors. We made a survey at that time of the Bobtail lode and of the Caledonia; Mr. Clapp did the work on the ground, and the field-notes of his survey were recorded in our books. I have the field-notes. The Caledonia survey was made from stakes on the ground at that time, marking its boundaries, and the Bobtail survey was made from the notes of a former survey made by Mr. Kello, which we checked over to see if

it was correct; this survey of the Caledonia was made in the spring or summer of 1878. I made a survey of the Bobtail lode myself in January last, which was the first complete survey that I ever made of it; before that time I had taken our field-notes and made connections between it and other claims in that locality, and
367 mapped them in various ways at different times. (Witness was here directed to look at a map hanging on the wall, inscribed "Map of the Bobtail mine," and showing in connection therewith the lines of the Caledonia mine and Queen of the Hills and a portion of Clara No. 2, purporting to have been made by J. D. McIntyre.) That map was prepared by myself from actual surveys, and is correct in accordance with those surveys. The dot near the southeasterly end, marked Bobtail discovery shaft, close to the old trail, is correctly located on that map with reference to its actual place on the ground, and the square, black dot, marked Caledonia discovery shaft, is correctly located on that map with reference to the place it occupies on the ground, and the mark designated as the Caledonia open works is also correctly located. The blue line there, marked Shoemaker's gulch, correctly shows that locality with reference to these conflicting claims, and the dark line,
368 marked old trail, running close to what is marked on the map as Bobtail discovery shaft, correctly represents the old trail upon the ground leading up Shoemaker gulch, over the hill, from Bobtail to Lead city.

On cross-examination the witness further testified as follows:

The diagram attached to the original complaint in this action appears to conform exactly with this map on the wall, which I prepared. The only difference is that the diagram does not show Shoemaker gulch, nor the Queen of the Hills mine. The boundaries of the two claims correspond. I know where the tunnel — below and west of the Bobtail discovery shaft, on the same side of the hill, but it is not marked on that map.

(Here witness was directed by defendant's counsel to mark its location on the map, which he proceeded to do.)

(Here follows diagram marked p. 369.)

370 The deposition of H. S. IRETON was then offered & read in evidence on the part of the defendant, and which is as follows:

I resided in the Black Hills, Dakota, in the middle of November, '75, until the middle of August, '78, and was engaged there in mining. I know where the Bobtail lead is on the east side of Shoemaker gulch, in the Whitewood quartz mining district, D. T., and became — with it under the following circumstances: About the 21st of Feb., 1876, as I was passing, on the ground I saw some quartz croppings; and on the 24th of that month, as well as I can remember, Thos. E. Carey and Daniel G. Chizum and myself located there a quartz mining claim, and called the same the Bobtail lead. We paced off the length and the width of the claim and put up squared posts and blazed trees to mark the boundaries of the claim, and put notices on

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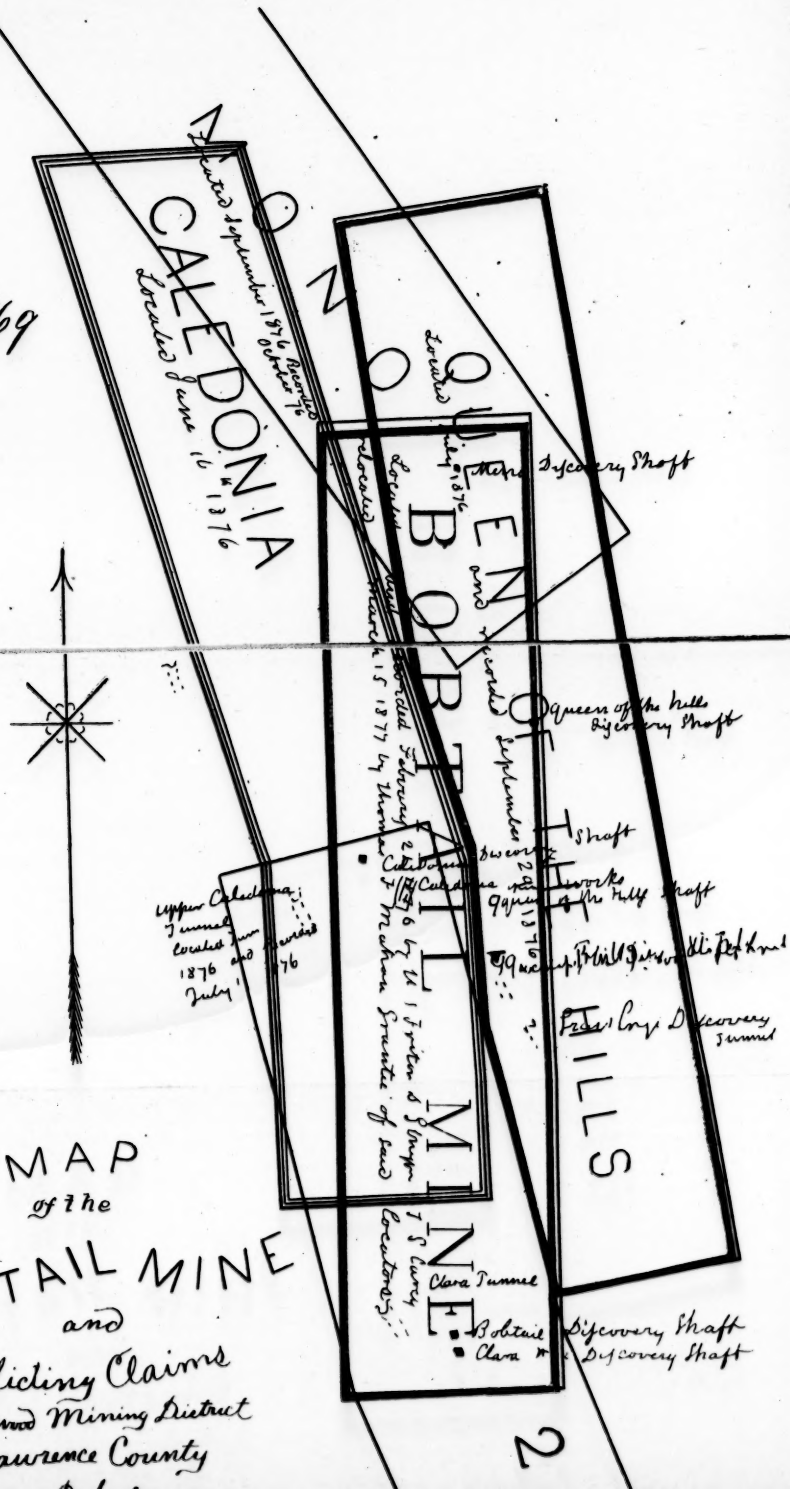

MAP
of the
BOBTAIL MINE
and
Conflicting Claims
Whitewood Mining District
Lawrence County

the posts defining what boundaries of the claim they marked. We made the discovery by the quartz cropping out on top of the
371 ground, where we sunk a shaft about 4 feet deep. We also sunk another shaft close by 8 or 10 feet deep, and had a cut run into the hill, but I do not remember the length or depth of that cut. Carey, Chizum, and myself sunk the first shaft, and a Mr. Raborg & Coleman did the other work for us on a contract. I consider that this work, and which was all done prior to July 4th, 1876, was worth at least $150.00.

The south centre end stake was a dead pine stump or part of a tree which we blazed and marked south centre end stake of the Bobtail lead. I think the southwest corner stake was a piece of a dead tree picked up close to this spot; it was set upon the ground and stones piled around it to sustain it, and it was blazed and written on with a pencil, northwest corner. I am not positive whether on that day there was a stake*d* placed on the west side centre, but I am of the impression that there was; I do not remember its description. The northwest corner of the claim was marked by a stump or portion of a dead pine tree standing there and which we
372 blazed and marked with a lead pencil, the northwest corner of the Bobtail lead. The north centre end stake was a piece of a dead pine tree that we picked up near the spot. [We] set it up and supported [it] by stones. It was blazed [and] marked the north centre end stake of the Bobtail lead. The northeast corner of the claim was marked by a green pine tree which we blazed and marked the northeast corner of the Bobtail lead. I am not positive whether there was or was not a stake on the east side centre; my impression is that there was. The southeast corner was marked by a piece of dead pine picked up close to the spot, set up, and supported by rocks, and blazed and marked the southeast corner of the Bobtail lead. The three north end stakes were blazed and marked in lead pencil by myself. Chizum & Carey assisted in setting up the other stakes, but I am not positive which one of us done the writing on the other stake.

The discovery shaft of that lode was situated a little over 200 feet north of the south centre stake. North of the south centre end stake, when I first made the discovery, I blazed and marked a tree situated on the claim. It stood about 25 feet southwest of
373 the discovery hole, and I placed a notice upon it about as follows:

Notice that we, the undersigned, claim (1,300) thirteen hundred feet in a northerly and two hundred feet in a southerly direction from this stake, or this lode.

I am not positive what was the width claimed in the notice. It was named the Bobtail lead in the notice; the notice was dated Feb. 24th, 1876, and was signed by myself, Chizum, and Carey, and I filed a notice of the location with Mr. Parker, recorder of the Whitewood quartz mining district. The discovered shaft of the Bobtail lode was sunk in gold-bearing quartz rock. I could see the gold plainly with the naked eye. Some time in the month of April or

May, '76, I made a contract with Mr. Raburg and Mr. Coleman by which they were to do a certain amount of work on the Bobtail claim, and we were to give them a one-third interest therein. They went to work on the claim soon after I made this contract and
374 sunk a shaft 8 to 10 feet deep, about 25 feet northerly from the discovery shaft; they also run a cut above and south of the discovery shaft. The shaft they sunk was in quartz rock and the cut was run in slide and quartz rock mined together. I do not know how long the discovery and boundary stakes of the Bobtail remained standing, but I saw some of them there after this work had been done by Raborg & Coleman. I sold my interest in the Bobtail to a man named Thos. Mahan about the last of Feb. or 1st of March, 1877. I fix this time by my having been out on the Wolf Mountain stampede in the month of December, and having been taken sick after my return, and it was just as I was recovering when I made this deed of the Bobtail to Mahan. Mahan came to me at that time and wanted to buy my interest in the claim; we agreed upon the terms and then we went to John M. Murphy and he drew up the papers. I then delivered the deed of conveyance to him; this was
375 the last of Feb. or 1st of March when it was written by Murphy. The deed bore a previous date; I think it was dated in the December previous; it was antidated at the suggestion of Mahan. Mahan agreed to pay me, and did pay me, for the Bobtail lead $150.00. Carey sold his interest in the Bobtail lead to me in M'ch, 1876. I do not know whether Chizum's name was in the deed along with mine or not. I gave him for it an interest in a placer claim on Gold Run gulch. I never had a power of attorney from Chizum to sell his interest in the Bobtail mine.

On cross-examination the witness further testified as follows:

I don't remember whether the northwest corner stake was a tree or part of a tree. The Gold Run claim was immediately south of the Bobtail, and at the time when we staked the Bobtail I saw the north centre stake of the Gold Run lode. I don't know that there was any distance—as much as 3 feet—between the north centre end
376 stake of the Gold Run and the south centre end stake of the Bobtail, as it was our intention to set the south end stakes of the Bobtail so as to correspond with the north end of the Gold Run, and I cannot say now that we intended the Bobtail to be an extension of the Gold Run lode, but it was my purpose to measure the Bobtail claim from the north end of the Gold Run, which I did. I did not intend to follow the direction or course of any other claim, and I was governed by my judgment. I do not think that we followed the course indicated by the Gold Run location. I am not positive that we set the side centre stakes at the time that we located the claim, but I think we did.

John M. Murphy wrote the deed to Thos. F. Mahan in his office at Gayville, Lawrence Co., D. T. I do not know who owned the building where his office was at the time, but it is my opinion that the recorder of the mining district had an office there on the same floor (second) with Murphy. I know where Tom Hanley kept his

saloon. It was on the same side of the street with Murphy'-
377 office and was close to it, but can't say whether it was adjoining or not. There was another paper drawn at the time besides this deed, but the form of which I don't remember. It was intended to govern *to* conveyance to Mahan. I left it with Murphy for safe-keeping, and he afterwards told me it was destroyed in the Gayville fire. This paper stated that if Mahan failed to pay me one hundred and fifty dollars by the first of the October following the conveyance by me to Mahan was to be null & void. Murphy mentioned gold coin of the United States in this contract, but the understanding between Mahan [and] myself was that it was to be dollars. About the first of October following Mahan paid me a quantity of gold dust on this contract, which I took for $50.00. I demanded the remaining $100.00 from him afterwards. He did not pay it until August, '78. Before I acknowledged this deed to Mahan, which I did on August 12, 1878, I had sold the Bobtail claim to a man by the name of Wells in February, 1878, because I was advised by John M. Murphy that my previous deed to Mahan was void on account of the non-payment of the $100.00. The deed which I made to Mahan was not acknowledged at the time that I delivered it to him. I believe it was signed & delivered on Sunday,
378 about the 12th of August, 1878. I acknowledged that deed before the clerk of the district court of Lawrence county, D. T., and received the $100.00 from Mahan. The $100.00 was an inducement for me to acknowledge it. Mahan made no threats, but McLaughlin threatened that if I did not acknowledge it *that* he would endeavor to make me do so. The threats did not have anything to do with my acknowledging the deed, but the receipt of the $100.00 did.

I remember something about the recording of claims by miners in the month of March, 1877. I did not record the Bobtail at that time with the mining recorder, as I had sold it. I never stated, before this recording of claims, to any parties that I had abandoned the Bobtail claim. I may have stated or said something to some parties about not prosecuting the work, but I never said that I had abandoned the claim. I know John Flaherty, Thos. F. Mahan, Jack Dawson, and Bill Trainor, and I did not state to Flaherty, in Gayville, nor to any others on the Giant lead, in the month
379 of Sept., 1876, near the Bobtail claim, that I had abandoned, or words to that effect.

Some of the parties named had jumped the Bobtail location, and when I met them on Giant Hill in Sept., '76, I was acting the part of an arbitrator about the Giant lode. They were at that time fortified on the hill, and were considerably excited, and I said to them that I was not going to fight them about the Bobtail; that was just what I told them. I gave them no such understanding as that I had no further claim to the Bobtail lead, and that they might remain in peaceable possession, but I did give them to understand that I would not fight or shoot over it.

I gave a deposition in this case heretofore at the request of the plaintiff, at the office of S. D. Prior, in this city (Winfield, Kan.), on

or about the 16th of Oct., 1878, before E. S. Bedilion, clerk of the district court of this (Comley) county, upon the same subject. I was duly sworn as a witness at the time, and I signed that deposition. I don't remember now what questions were asked me
380 at that time in relation to the matter of abandonment nor just what my answers were, but my memory was not in as good a condition then as it is now, as my health was not as good then as it is now. I have talked freely with the attorneys on both sides for the last two days, as they both have been questioning me. I have talked with the attorney for the defendant about the facts of the case, but nothing was said about the testimony to be given by other witnesses.

We talked about five minutes, and that was about all the time we occupied in the conversation.

I think the reason why I did not record the Bobtail claim in March, 1877, when the other miners here were recording claims, was because I had conveyed the same to Mahan. The conveyance was a conditional one, as I understood it, and was to become void upon the failure to pay the money. A part of the money only was paid at the time agreed upon.

The discovery shaft of the Bobtail lode as left by myself
381 and colocators was 4 or 5 feet square and 4 or 5 feet deep. I don't know how long we worked. We worked there at different times; sometimes all three of us, and sometime- only one. Under the circumstances then existing if I had to do the work myself I would require about 10 days. There was a lack of suitable tools—a lack of blacksmith- to keep the tools in order—a lack of food—severity of weather, the ground being frozen very hard—lack of clothing and big snows. If a man had the proper tools, proper facilities, it would ordinarily take about 5 days' labor. The shaft was on the side of a hill. I don't mean that its average depth, including upper and lower side, would be about 5 feet.

The tools we had were picks & shovels, and we ought to have a drill and hammer. The shaft which Coleman & Raborg sank was from 8 to 10 feet in depth, and from 5 to 6 feet in width, and about the same in length. I don't remember the dimensions of the cut, but it was some 10 or 12 feet long, about 4 feet wide, and about 6 feet deep in the front or face. It started on the side hill, and
382 was run in until it reached the depth mentioned. I know that a portion of this cut was in quartz rock. I don't know that there was any slate in it. There might have been a little in the side on top. The cut was a little west of south of the discovery shaft towards Shoemaker gulch. I know that 4 or 5 feet of this cut was in quartz rock of my own knowledge. It would take a man about 10 days to sink that shaft. It was sunk in slide & quartz rock. There was about a foot and a half of slide, and the balance all quartz.

I am positive there was quartz in the Coleman & Raborg shaft & cut, but am not positive as to the quantity. To run the cut it would require seven or eight days' work. I do not remember any other work. After Coleman & Raborg done this work we estimated it worth at least $100.00. They came to me and relinquished the con-

tract, because the rock did not prospect good enough to suit them, and that they had got other interest, and they wanted to relinquish the contract.

383 At the time of the re-recording of claims, in March, '77, other parties were in possession and claiming portion of the ground on which the Bobtail had been located; the Caledonia covered a portion; the Clara No. 2 a portion I don't know whether the Queen of the Hills covered a portion or not. I have seen a stake about the Bobtail shaft marked Clara No. 2 and also one marked the Neptune, but did not see any location notice that I remember about.

Q. 81. If at the time of this recording of claims, in March, 1877, this Mahan deed was not in fact made, have you any reason why you did not relocate the Bobtail claim, and was not [it] a fact that you had lost all faith in the claim and did not intend having anything more to do with it and that other parties were in possession of the ground?

Answ. No, I have no reason. My impression is that I would have recorded it; no, I had not lost all faith in it; I had a little faith yet; I entertained one interest concerning the claim with the supposition that the deed to Mahan was not made; there were other parties in posession of the claim at that time.

Miners' wages ranged from four to six dollars per day from Jan. to July, in the year 1876, in the Black Hills.

384 On redirect examination the witness further testified as follows:

I never instituted any proceedings to set aside the deed to Mahan for non-compliance with the contract, nor did I offer to refund the $50.00 which he paid me. J. M. Murphy informed me that the deed became invalid on account of the non-payment of the money. There were two witnesses to the execution of the deed, but their names I have forgotten. I afterwards acknowledged it of my own free will, and the $100.00 which I received at the time that I acknowledged it was the balance due from Mahan to me on the contract, and I so understood it at the time. The Clara No. 2 discovery shaft was sunk within 25 feet of the Bobtail discovery shaft.

On recross-examination the witness testified:

About the time that I acknowledged the deed Mahan and I went to McLaughlin's office. He showed me the deed to Mahan and pointed to my signature; asked me if that was my signature;

385 I said it was. He then asked me if I would go before a proper officer and acknowledge it. I told him that I would not answer that question at the present moment. He then asked me if I refused to acknowledge it. I said that I could not answer that either at that time, as I did not [know] what I was there for, and if he would inform me what he wanted of me I could give him answers. He then made a statement that he could have me brought before a justice of the peace, or some proper officer, and asked me if that was my signature. I then said to him that I have not denied the signa-

ture, and when he asked me again if I would go and acknowledge it I told him I was not ready to answer his question yet. Then he said that I was combined with the Caledonia boys to defeat Mahan. Mahan said that I was not. McLaughlin also said he would make me a party to the proceedings, and accused me of being combined with the Caledonia boys to defeat Mahan. I told him I did not think
386 that I was brought there to be abused, or something to that effect, and that if he wanted to take any proceedings against me to go ahead. Mahan did not coincide with McLaughlin, but said he was ready to pay me the $100 as soon as I would acknowledge the deed, and I went and acknowledged it and he paid me the $100.00. Murphy was a lawyer and I relied on his opinion about the deed and the contract; thought myself that the deed was void if the contract was not complied with. I don't remember saying in my former deposition, or in my conversation on Giant Hill when I was acting as arbitrator, that I had lost faith in the Bobtail mine, or that I didn't think it would pay, or that I had not done work enough on it, but I may have made a broad assertion that I did not think that the quartz in that locality was very good or worth killing one another over, or that I hadn't done work enough on my mine to know whether it was any account or not. I know that I talked in a pacific manner to pacify them and evert the im-
387 pending trouble. The work that Raborg and Coleman had done was as valuable as any other work in developing the claim, but they did not do the amount of work which they had contracted to do.

388 Defendant then offered in evidence the deposition of DANIEL G. CHIZUM, of date Dec. 31st, 1879, which was as follows:

I was residing in Deadwood gulch, on claim No. 5, below Discovery, in Lawrence county, Dakota Territory, in the spring and summer of 1876, and engaged in prospecting and mining. I discovered and located the Gold Run lode. I had about 6 years experience in quartz mining in Montana; was one of the locators of the Bobtail lode. This claim is located at the head of Shoemaker gulch, on the northerly side of a ridge that divides Bobtail gulch from Gold Run. The claim was discovered by Ireton & Carey somewhere between the 15th & 28th of Feb., 1876. They went across the ridge to prospect for placer mine on Gold Run gulch, and on the way discovered cropping of the lode. They marked a dead pine tree, and wrote a notice on it with a pencil that they claimed the lead. The quartz cropping contained gold, which I saw in it with
389 my eyes. The Bobtail lead was located by Ireton, Carey, & myself. We done some digging on the lower side of the lead and also some on the upper side; satisfied ourselves that it was quartz in place, and then we measured and staked off the claim. I marked some of the boundary stakes, but not all. The southeast corner was marked by a stake and a mound of rock piled around it. The centre on the west side was a green tree of the pine kind, and the centre stake on the east side was a stake. The southwest corner, the northwest corner, and the northeast corner I cannot describe.

The south centre stake was either a pine, oak, or quaking ash stub. I am not certain what the north side centre was. I am satisfied that *that* there were two or three other trees or stumps marking the boundaries beside those I have described, but I cannot now place them in my mind. There was a notice on the stakes of the name of the lode, the number of the stake, and on the discovery stake was the name of the lode, the name of the locators, the date of location, and the number of feet we claimed in length & width. The stakes were
390 marked by Ireton, Carey, & myself. After the location I worked one day on the claim with a man that had been sent by Ireton. I cannot describe the work except that we sank a shaft, the lower side of which was about 4 feet in depth and about 6 feet in length. We also made a cut commencing at the path turning up Shoemaker gulch, on the lower side of the lead, which extended up to the lode. This cut was about 10 or 15 feet in length and was wide enough for us to lift the dirt out of. We done some digging on the upper side of the lead, perhaps two or three feet deep. I know of no work done on the lode in the month of March except what was done by myself and colocators. I do not know that either of the locators sold his interest in the Bobtail in 1876. I estimate the reasonable value of the work done by Carey, Ireton, & myself, prior to April 15, '76, at $25.00. I marked a dead pine tree as a discovery stake myself on the day we located the claim, and this was between 2 & 4 hundred feet from the south end of the
391 lead. This was a dead pine tree about 12 to 15 inches in diameter, and I wrote on it the name of the lode; that it was the discovery stake, the date of discovery, the number of feet claimed in length and on each side of the discovery point, and the names of the locators. I wrote this notice myself on that tree. I do not know how long it stood there, but it was there the last time I was on the ground in '76. In putting up the stakes they were supported at the bottom by being put in the ground some, but not very deep, and puting rock around them; they were all 4 feet above the ground. The claim was in brushy and uneven country, so that it depended entirely on the character of the ground as to how far they could be seen by persons approaching them. I do not recall any personal acquaintance with Frank Raborg and J. H. Coleman, but knew them merely by reputation. I know nothing about the contract made with them to do work upon the Bobtail lode in April, 1876, except what I got from Ireton. He informed me about the con-
392 tract at the time, and I said arrangements that he made with them would be satisfactory to me. I never saw them at work on the lead, but passed by there several times and saw that there had been work done there by some persons, and supposed that it was done by the men of whom Ireton spoke. I was engaged in other work which I thought more important, and paid little attention to it. I sold my interest afterwards to Mahan. I did not abandon my interest in the Bobtail, but when I left the hills in '76 I left Carey & Ireton there, and I supposed that they would represent the claim. In the spring of '77 I went back to Deadwood to collect some money which was due me; I also intended to go to the Big Horn country

to prospect there. While I was at Deadwood I did not go upon the claim nor did I see Ireton & Carey, but went off on my prospecting tour, and have not been there since. I had it in my mind, however, that I would go back there some time, and, if it had not been relocated, that I would represent it by labor. I never author-
393 ized any one to sell my interest in the Bobtail claim. I left the Black Hills in '76, and when I returned in '77 it was not to remain there any longer than to collect the money due me. Ireton never reported to me that he had sold my interest in the claim.

On cross-examination the witness further testified as follows:

I do not know what the terms of the contract was with Raborg & Coleman; what I learned was from Ireton, and do not know why they threw up the contract. I saw some work done only a few feet distant from the Bobtail discovery, which I suppose was done under this contract. This was about the latter part of May, while passing over to Gold Run gulch. I did not particularly examine it and cannot tell how many days it would take two ordinary miners to do the work I saw. My deposition has already been taken in this case twice, and once I made an affidavit. I do not know what the legal definition of the word abandon is, but I understand it to mean to forsake, to give up, to
394 disclaim or disown. In one of my depositions I said that before I made the deed to Thomas F. Mahan that I had never sold it nor given it away, and, therefore, never abandoned it, and when I so stated I understood that abandonment of a mining claim included either selling it or giving it away, and I have no different understanding now. I did not know in 1876 what amount of labor the laws of Dakota required, but I did know that if the amount required was not done each year that the claim would be subject to relocation. I had never given up the idea after I returned from the Big Horn Mountains to Iowa of returning to the Black Hills for the purpose of developing and working the Bobtail lead until I sold to Mahan. I gathered the idea from Mahan at the time I sold that it had been relocated and that he had bought the interest of Carey & Ireton. He paid me $25.00 for my interest. I knew nothing at that time that the Caledonia Gold Mining Company, Clara No. 2 Mining Company, & the Queen of the Hills Mining Company were each in possession of large portions of the Bobtail lode, claiming to
395 own the same, or had been working upon the ground, and I do not recollect of ever having heard of such claims before I left the Hills. I do not recollect of seeing any shafts sunk to the southwest of the Bobtail discovery about 30 feet, or north of it about 50 feet. I was not over the ground after the month of June, '76. I did not notify any parties that they were working on my ground, for the reason that I did not know that any such parties were working there.

396 The deposition of JAMES H. ANDERSON was then read in evidence on the part of defendant, and is as follows:

I am a farmer, and live in Wright county, Iowa. I came to Lawrence county, Dakota Territory, in the latter part of Feb., '76, and resided there until July, '77; was engaged in prospecting & mining while there. I know where the Bobtail lead is, near the head of Shoemaker gulch, and first saw it on or about the 15th of March, '76, as I was going over to what is called the Giant lode. I subsequently became interested in the Giant lode. The north end of the Giant location joined the Bobtail on its southern end. I knew Ireton. At that time I saw the discovery notice on a tree a few feet to the southwest of the discovery shaft; it was a dry, dead pine tree. I read the notice; it claimed 1,500 feet in a northerly & southerly direction and, I think, 600 feet in width. but of this I am not certain. Nearly all the first claims located at that time claimed 600 feet in width. According to the measurement we made afterwards that discovery tree of the Bobtail stood within the
397 boundaries of the Giant mine. I have forgotten which was the other location, but one or the other lapped over. I saw that same tree there for some time afterwards—couldn't state how long—perhaps a month; it was cut down when I passed there the other day; the stump is there yet. In the spring of 1876 I was staking the Giant mine and found a small stake of the Bobtail, or I think it was intended for a stake; think it was the centre end stake—will say the southern end stake of the Bobtail; this was a small, dead pine tree, cut off about 4 or 5 feet above the ground, on which was a notice claiming the Bobtail mine. It's my recollection now that we cut down the stump close to the ground and made a stake of it for the Giant mine. At that time there was a small hole dug there 3 or 4 feet wide, 3 or 4 feet deep, 5 or 6 feet in length; this hole or cut run nearly in a north and south direction and was in quartz, and it was 12 or 15 feet east of north of this stake of the Giant that I speak about. Afterwards, in the spring of 1876, I saw Coleman & Raborg working there a few feet away from this hole; they were sinking a shaft 5 or 6 feet square, and the material was quartz and tahose slate; this was in the latter part of April. Coleman was a partner of mine in other mines at that time. I saw them there at work on two occasions. I also saw a cut there
398 some time in the month of May, as well as this shaft, which [was] some 8 or 10 feet deep, about 5 feet wide, and some 10 or 12 feet long; this cut was sunk in red-looking quartz; it was a little south & west from the shaft where Coleman & Raborg were at work. The value of all the work done there that spring on the Bobtail claim was about $150.00.

On cross-examination the witness further testified as follows:

I was present and carried the tape-line; we measured off the Giant lode and saw the south end centre stake of the Bobtail; this was the fore-part of June, '76; we then established the northern boundary stakes of the Giant. I never saw any north boundary stakes of the

Giant before this time. We first established the north centre end stake of the Giant by cutting down a tree and marking the stump; then we placed the northeast corner stake, as I have stated, by cutting down the Bobtail stake; then we put up the northwest corner stake. The northerly center end stake of the Giant was distant from the Bobtail Discovery hole in a westerly direction down the hill about 150 feet, and stood to the east of the channel of Shoemaker gulch—I should say 300 feet. The northwest corner stake
399 of the Giant stood within about 150 feet from the channel of the gulch. We removed what we took to be the northerly center end stake of the Bobtail—which was a tree—about 150 feet in a westerly direction, and east of the centre of Shoemaker gulch. I consider the centre of Shoemaker gulch the prong or fork which bears up near the foot of the mountain west of Shoemaker gulch, and this south centre end stake of the Bobtail stood between 5 & 600 feet a little north of east from the place where this deepest channel of Shoemaker gulch comes up to the top of the divide going over towards Golden Run. As I said, the south centre end stake of the Bobtail lead was a tree, and it stood about 40 feet distant from the Discovery tree, in a southeasterly direction. It was hewed on two sides, and it had the same names on it that were on the Discovery, and we concluded they didn't want two discovery stakes. I remember Ireton's name and old man Chizum's on those notices—at least that is my recollection when I come to study about it. I am
400 not positive as to the distance between the two trees, but I am not far from the correct distance. Across the face of a stake that we cut down was written in pencil mark "Bobtail lode," and a notice claiming 1,500 feet in a northerly direction. I don't think it claimed anything in a southerly direction, nor do I recollect whether it said end stake or not; I don't remember having seen any other stakes of the Bobtail.

Q. 35. If Henry S. Ireton should testify in this case that the south centre end stake of the Bobtail, as he established it, was distant about 300 feet from this dead pine tree, near the hole which you saw in March, 1876, what would you then think as to the correctness of your recollections of the distance from this pine tree to the stake which you removed?

A. Well, it depends. Well, I should think he was wrong. Of course he ought to know better than me, but I should say he was wrong. I never measure- it; never had any occasion to.

Q. 36. If Daniel G. Chizum, another of the locators of the Bobtail, should testify that its south centre end stake was from 200 to 400 feet southerly from this dead pine tree, what [would] you then think as to this small pine stump which you removed being the south centre end stake of the Bobtail?

401 Answ. Well, I should either have to think that they had two end stakes or that that was not an end stake. I know both Ireton and Chizum. It was in April when I saw Coleman and Raborg first at work there. I used to pass by there once or twice a week during the month of May, but never saw them working in the same place on the Bobtail more than once. I saw a shaft prior to

July that was more than 10 feet deep on the Bobtail lead. I think the first shaft that they sunk in April was that deep. I didn't measure it; walked up to it, looked into it, and examined the stuff that was thrown out of it. I passed by there about two weeks ago alone, while going over to the Homestake mine, but saw no trace of the work that was done there in April & May, '76. My statements as to distances, directions, quantity of work, &c., are based upon general recollection of matters 4 years after they occurred.

My being mixed up in the Giant location caused me to take more notice of the Bobtail location than I otherwise would have done. I I don't remember now of reading any other notice on that tree except the Bobtail; there might have been and I might have read it and not remember it now. It would be more like to remember about the Bobtail on account of the controversy.

402 Q. 58. Are you positive, Mr. Anderson, that the notice which you say you saw over the small pine tree from 20 to 40 feet east of the dead pine tree claimed 1,500 feet in a northerly or northwesterly direction?

Ans. I am positive as [to] the number of feet claimed, but it is possible it might have been northeasterly instead of northwesterly; I am not entirely positive about that part of it.

Q. 59. Are you positive that the notice on the dead pine tree claimed 1,500 feet in any one direction?

Ans. Well, that is my recollection of it; of course I could be mistaken; that is the memory I have of it now. The small shaft which I saw there in March was to the left of the trail going up.

403 My recollection is that all of the work was in ground that could be worked with a gad—most of it with a pick and shovel. I have made another estimate of the value of the work done there prior to July, '76, and I think it possible that it could have been done for $50.00 less than my former estimate; an ordinary miner using tools in ordinary condition and repair could probably do the work in 20 days.

I became acquainted with Thos. F. Mahan in Utah before I came to the Black Hills, and I think I met him here in the summer of '76; I did not see him at work on the Bobtail ground in the month of July, '76. I went out of here to Salt Lake on the 16th of June and got back the latter part of July, '76; I think it was along there—the latter part of May or fore part of June. I have no recollection of seeing a discovery stake, other than those that I have spoken of close, to this shaft that I saw in March, '76. I know where there were a number of holes sunk and cuts made down the hill in a northwesterly direction about 200 ft. from the Bobtail discovery; they were made in May or June, '76, and I and Coleman

404 dug the first one sunk there; it was after Raborg & Coleman had finished work. Coleman & Flaherty made a location there, so they informed me, called the Washington. It was located just below and near the centre end stake of the Giant; that's as near as I can remember. I prospected one piece of rock out of the shaft where Coleman and Raborg were at work, but got nothing out of it. The shaft that Coleman and Raborg were working in

when I saw them was some feet north of the north end boundary line of the Giant, and also in an easterly direction. I never looked for any Bobtail stakes other than I have testified about. I think the name of Muckles was also signed to the Bobtail location notice. I don't swear positive as to that. In trying to remember the names that I saw there, I think Muckles' name was on that stake. I remember that old man Chizum told me that Muckles was interested in the Gold Run. I now remember that the name of Thos. E. Carey was signed to the location notice of the Bobtail, but I do not recall
405 that the stake which we cut down and made a Giant stake of was the north centre end stake of the Gold Run lode, as well as the south centre end stake of the Bobtail. When I first saw the Bobtail, in March, '76, the ground was frozen hard.

On redirect examination the witness further testified as follows:

If there were any indications whatever on the stump of the small pine tree which we cut down and removed showing that it was a Gold Run stake I have forgotten them. We cut off all of the Bobtail inscription in making a Giant stake of it. I remember that there was writing on both sides, and I read the writing first on one side and then on the other, but, supposing that it was a Bobtail stake, I don't remember that I paid any particular attention to the writing on only one side, and cannot say that I examined it sufficiently to satisfy myself that it was only a Bobtail stake. I did not then know that any other location reached that point, or that there was any chance for it's being anything but a Bobtail stake.

406 FRANK RABORG was then called as a witness on the part of the defendant and testified as follows:

I am engaged in mining and I have been in the Black Hills since about the 1st of April, '76. Some 5 or 6 days after I came to Lawrence county I became acquainted with the Bobtail lead, on the left hand side of Shoemaker gulch. I knew both Ireton & Chizum. J. H. S. Coleman & myself made a contract with Ireton to do a certain amount of work on the Bobtail for a one-third interest in it. This was some time in April or about the first of May. We worked in four different places. First in a shaft 4 or 5 or 6 feet deep, which was on the trail, then in another shaft a little up the hill from that, then still further up going towards Lead City about 20 feet we run a cut, then again possibly 50 or 60 feet further. We did some more work on a kind of a cut immediately below the discovery stump. The whole surface of the ground there was covered with quartz similar to the De Smet quartz, and every place we sunk was in a quartz.
My recollection is that the discovery stake was a stump 15 or
407 16 feet high, the top of which had fallen off or been burned off, and on which stump was written the usual mining location notice. The name of Ireton & Chizum and another party, whose name I have heard frequently, was to it. In the two first places that I speak off we found that some work had been done—I should say $30 or $40 worth of work, in one place a cut, and then some 5 or 6 feet above that there was a shaft 4 to 5 feet deep, 5 to 6

feet wide. This shaft was in quartz, loose quartz; they had not got down to the solid formation, such quartz as you find on the Father De Smet and the Rhoderick Dhu—dashed with iron—frequently pieces nearly all iron. I never found any gold in it. We prospected it, I don't know how many times, and we never got any gold at any time. I have been mining since '71, but this was my first experience in gold mining. The cut was started in from the trail and had a face of 4 or 5 feet, and was all run in broken quartz. We did not get down to the solid formation. The whole mountain seemed to be quartz. Coleman & I sunk this first cut a little deeper; then we went up higher on the trail and we run another cut 15 or 20 feet in length and wide enough so that we could work comfortably in it—from 4 to 5 feet wide—
408 and it likely faced up 8 feet. It was all in quartz. The cut that we found was an ordinary prospect hole about 5 x 6 or 6 x 6. We sunk it a little deeper than it was when we found it—probably 3 or 4 ft. This was all quartz. We did no blasting. All the work which we did would not vary 20 feet from a straight line drawn from the first work we found to the discovery stake on either side, and I think that the farthest work away from the Bobtail discovery would not exceed 50 to 50 feet. We thought at the time that we had done considerably over $100.00 worth of work. I don't remember now whether we were to get the title by the value of the work done or the number of feet which we were to sink, but we were satisfied that we had done over $100.00 worth of work, and they were satisfied to give us the title. We couldn't take it because we couldn't get any gold there and was not satisfied with the prospect. I think we estimated our work at about $5.00 a day, and furnished our own tools and did our own blacksmithing. I do not know which was the discovery of the Bobtail, the little cut or the
409 shaft. There was two workings there when we went up, and both exposed all quartz. The Bobtail notice was written upon wood—on the stump, is my recollection, and it has been cut off close to the ground since. The notice did not strike me as being different from the ordinary mining notice, but I cannot repeat it word for word. It claimed the usual mining claim of 300 feet in width by 1,500 feet in length in a northerly and southerly direction. I can't recall now whether it claimed an equal number of feet on each side of discovery or whether it claimed more on one side than on the other. Ireton & Chizum'- names were signed to it, and another party. The location purported to have been made prior to the time that we went there to work. We must have finished our work about the 20th or 25th of May. We sunk the shaft about ten feet deep. When I was there a few months ago the whole thing seemed to be faced up by what we call a dump. The discovery shaft that I speak of is under the dump and filled up by it and is a part of the dump now.

410 On cross-examination the witness further testified as follows:

I do not know the points of the compass there exactly; can't state

whether all the work was on a line due north and south or not. It was left of Shoemaker gulch and mostly to the left of the trail. It is my recollection that we sunk the first hole which we found there 3 or 4 feet. I think we found this cut facing up 5 or 6 feet, running into the hillside, and we sunk it deeper at the face, which would make 7 or 8 feet. We did not lengthen the cut—we sunk on it. It was the usual width, from 5 to 6 feet. The next work that we found was just up the hill from this cut, probably 5 or 6 feet to the left—this was a shaft—and we sunk this deep enough to make it 8 or 10 feet. We had no windlass on the ground while working there; it was about 6 x 6 feet in width—just an ordinary prospecting shaft. Then we went above towards Lead City and we run a cut from 15 to 20 feet in length and wide enough to work comfortably, between 4 & 6 feet.

At the cut near the discovery tree I do not remember how
411 much work we did, but I worked there at different times; it was within 10 or 15 feet of the tree and between it and Shoemaker gulch. We used no powder and did not blasting, but whether we used gads and hammers or not I do not remember. The whole hillside there seemed to be a mass of quartz. We did not determine whether it was a ledge or a mountain of ore or what it was. We found no walls; it was the same every place we sank. We sunk in on [a] place on the right of the trail just below the discovery tree. I certainly read the location notice on that tree a number of times. It was an ordinary mining location notice and did not strike me as being different from the ordinary miner's notice & does not now, but I cannot tell just what it contained. I was posted at that time as to the requirements of the mining law of Congress of May, 1872, but was not as to the law of Dakota Territory. I may have heard some one say what the requirements of the law of Dakota were with reference to the location of quartz claims, but I do not remember. I understand that under the law of Dakota
412 a quartz location may be 1,500 feet in length by 300 in width. We encountered no difficulty from frost at the time we went to work. I don't think there was any frost in the ground. I don't see how the frost could have interfered with us, as where we were at work it was all quartz. While we were doing this work I lived at the mouth of Bobtail gulch, within 20 feet of Mr. Ireton's cabin, and we went from our cabin right up Shoemaker gulch by the trail to our work, a distance of about ¾ of a mile.

On re-examination the witness testified as follows:

When I was there three months or more ago the place where we worked and the work that we did was so disfigured and obliterated that I could not tell exactly where we worked, but I think that the dump there now covers up and disfigures our work. The little cut or hole that was made on the right-hand side of the trail just below the discovery tree was in the neighborhood of 60 or 75 feet
413 from the discovery shaft. Along there and while I was working there Mr. Flaherty & Mr. Anderson were running around the hills there and working below us. I saw them frequently,

nearly every day, prospecting around for claims. I remember Mr. Anderson visiting us, and one day he ordered me to quit work where I was, as it conflicted with him in something. They wanted me to go back and work on the Bobtail discovery. He seemed to be very angry, and if I did not quit where I was at work he would raise old Ned. This was at the cut south of the discovery, immediately under the discovery tree, and the farthest work from the discovery. When I speak of the left of the trail and right of the trail mean as I you go up Shoemaker. My recollection is that the first cut started immediately on the trail and the shaft was about 10 or 15 feet from the trail.

On recross-examination the witness further testified as follows:

414 Anderson claimed that he had found some rich float rock on the other side of the Bobtail, in Shoemaker gulch, or some place there; that he wanted to make a discovery and wanted me to go back to the discovery of the Bobtail. I was then at work immediately under the discovery tree. I do not know whether he made any location there or not.

415 A. S. STEWART was then called as a witness on the part of defendant and testified as follows:

I am register of the United States land office in Deadwood, Lawrence county, Dakota. An official map of the Bobtail lead and a copy of the fields-notes of survey were filed in my office on the 19th day of April, 1878, together with a copy of the location and the relocation notice of that mine.

Witness here identified a certificate copy of the location certificate of the Bobtail lode, which was filed in his office on that date, and is as follows, marked Defendant's Exhibit "A:"

DEF'T'S EXHIBIT "A."

BLACKTAIL, *February 24th*, 1876.

Bobtail lead, situated on the left-hand fork of Bobtail gulch, Lost mining district, commencing at the north end of Gold Run lead, and running 1,500 feet northeasterly direction from the place of beginning; discovered February 21st, 1876; located February 24th, 1876, by H. S. Ireton, T. E. Carey, D. G. Chizum.

416 I hereby certify that the above is a true and correct copy of the original location notice of the Bobtail lead as said original appears of record in book 1, page 2, of the records of the Whitewood quartz mining district.

Gayville, D. T.

T. H. CARR, *Recorder*,
By JAMES B. CARR, *Deputy*.

The undersigned, being desirous — more fully comply with the laws of the United States, does hereby make and file this supplementary record to the said original notice of location to show pres-

ent ownership and claim and to cover any illegality that might attach to making mining locations upon an Indian reservation. Now, therefore, I, the undersigned, not waiving any rights had by prior location of said above-mentioned claim, known as the Bobtail lode, do hereby relocate said Bobtail lead. Said lead is situated on the left-hand fork of Bobtail gulch, now commencing at the discovery shaft and extending 1,300 feet northerly and 200 feet southerly therefrom. I also claim 150 feet on each side of the discovery
417 shaft as said claim was staked on the 24th day of February, 1876. I also claim all the rights and privileges guaranteed by the laws of the United States, Territory of Dakota, and local laws and customs of Whitewood district.

THOMAS F. MAHAN.

Endorsed.

TERRITORY OF DAKOTA, } ss:
County of Lawrence, }

Filed May 10th, A. D. 1877, at 11.40 a. m., and recorded in vol. 9, page 144.

J. A. HAND,
Register of Deeds,
By C. E. HANRAHAN, *Deputy.*

418 C. H. MCKINNIS, being sworn on part of the defendant, testified as follows:

I am the register of deeds of Lawrence county, D. T., and took possession of the office about the 15th of December, '77. My predecessor in office was James A. Hand, and C. E. Hanrahan was his deputy. Here witness was shown a charred paper purporting to be the original paper filed in the register of deeds' office May 10th, 1877, of which Exhibit "A" purports to be a certified copy of the record made from said original in vol. 9, page 144. The copy that A. S. Stewart, register of the United States land office filed there April 19th, 1878, is the same as this original as near as I can make it out, excepting the certificate of James A. Hand. The paper is badly burned. The original seems to be in the handwriting of Mr. Carr; I can't say whether it is or not, but it looks like it.

On cross-examination the witness testified further, as follows:

I cannot swear that I ever saw this burned location certificate of the Bobtail lead before the fire, but think I have; I think I
419 remember seeing it on the records in the spring of 1878, about the time that application was made to patent the Bobtail; that is my best recollection. I saw this burned paper purporting to be the location certificate of the Bobtail when it was filed in my office for record after the fire.

Here defendant introduced a location notice of the Bobtail lode by Ireton, Chizum, and Carey, and a relocation of the same by Thomas F. Mahan, as recorded in the county recorder's office of Lawrence county, D. T., on the 10th day of May, 1877, and ask- leave

to substitute a certified copy of the same on account of the dilapidated condition of the original certificate by reason of the fire of September 26th, 1879, which was permitted by the court after an examination of the same by the plaintiff, and is now offered in evidence, and is the same as Defendant's Exhibit "A," last above referred to.

420 The deposition of ROBERT JONES was next read and offered in evidence and it was as follows:

I went to Lawrence county in 1875. I resided in Lead City until December, '76, when I left, and returned back again in the spring of '77. I mean to say I lived where Lead City now stands, in '76. I know where the Bobtail lead is, and became acquainted with its location, which is at the head of Shoemaker gulch, Whitewood quartz mining district, Lawrence county, Dakota Territory, about the 1st of March, 1876. I found the location made there by Ireton, Chizum, and Carey, called the Bobtail lead, and claiming 1,500 feet in length, and I think 150 feet in width on each side of discovery; the width of the claim was either 250 or 300 feet; I think 300 feet; I read the location notice of the Bobtail — at that time; it was written on the discovery stake, and claimed 1,500 feet in length by 150 feet on each side, and had the names of Chizum, Ireton, and Carey on it. This notice was written on a stake, and I found Ireton and Chizum
421 there. Ireton was working on the left-hand side of the trail going up the gulch. I became acquainted with some of the boundary stakes of the Bobtail then; the south centre end stake was either a dead or a green tree—I don't remember which—but it was afterwards cut down by Jim Anderson to make a stake for the Giant lode; I saw him cut it down. The southwest corner was a dry tree; the southeast corner was a stake, about 4½ feet high, with rocks piled around it; the east side centre stake was a stake with rocks piled around it; the west side centre stake was a stake, if I remember right, because there was no timber at that point. The northeast corner stake was a green pine tree, with a notice squared in the side of it; the northwest corner stake was a dried tree; the north end centre stake was a dead tree—a stump—and was cut down in the spring, in April; the discovery stake was about 4½ feet high, blazed on two sides, and the location notice written upon it. I think they claimed 75 feet southerly and 1,425 feet northerly from the discovery. I saw Carey & Ireton working; Chizum was upon the
422 hill walking around. The work was about 75 feet from the south end of the claim and right close to the trail. These two men, Carey & Ireton, counting the high price of living, high price of powder and tools and labor at that time in that locality, did $150 worth of work, I should think. In March I saw a cut there 6 or 7 ft. long. The top was in loose quartz and the bottom was in solid blasting rock. It was run about southeast from the trail into the hill. I passed by it twice every day as I went to and returned from Deadwood. I saw Coleman & Raborg working there in the latter part of April and the early part of May in the same cut where Carey & Ireton had worked. They then went a little to the right-

hand side and sunk a hole, and after that they moved to the south and made a hole. I passed there nearly every day while they were at work, and use- to stop and talk with them. The shaft was about 75 feet northwest of the old discovery and was about 8 feet deep.

The one farthest south was between 7 & 8 feet. I should
423 judge that the discovery shaft was 12 feet deep. They were all sunk in loose quartz; the bottom was tolerably solid. I should think altogether the works was worth about $400. I prospected some of the rock from the Bobtail claim myself that spring that I took out of the discovery shaft and out of the south hole—I think about 2 or 3 pounds—and I found gold in it. I pounded it up in a mortar, and washed it out in a pan and got 10 or 15 colors. In the discovery shaft there was exposed a good solid vein of ore, and you could trace it for two or three hundred feet by the cut crop south from the discovery, and you could trace it north a good place by the boulders along the course of the vein.

Plaintiff waived reading cross-examination.

424 The deposition of JAMES H. HICKS was then read and introduced in evidence and is as follows:

I was on Deadwood gulch in the early part of January, 1876, and resided thereafter for a couple of years at Gayville; was engaged in mining and knew that mining claim at the head of Shoemaker gulch, Whitewood quartz mining district, called the Bobtail. I first knew it about the 27th or 28th of Feb., '76, as I was coming across what is known as Clara Hill or Giant Hill. I would not be positive whether at that time the discovery stake was a tree or stake; there was a location notice on it, the substance of which, to the best of my recollection, was that under the heading of the Bobtail lead or mine they claimed 1,425 feet in a northerly direction and 75 feet in a southerly direction. I knew the location of it personally and visited it in company with Mr. Carey, one of the locators. Mr. Carey, Mr. Ireton, and Chizum's names were in the notice written on the stake.

The time I visited with Mr. Carey was in May, 1876; when I
425 first saw it, the end of February, work had been started and some work done on it; I should say 8 or 10 days' work.

Q. 15. State what was the condition of the Bobtail claim when you visited it about the end of February, 1876.

A. It was staked—some work done on it.

Q. 16. State what work was done on it at that time.

A. Well, I suppose there was 8 or 10 days' work done on it at that time.

Q. 17. State what that work consisted of. I allude to the end of February, 1876, when you were first on the claim.

A. It consisted of an open cut.

Q. 18. Where upon or what part of the Bobtail claim was that open cut?

A. From 40 to 60 feet to the left of the discovery. I think it's in that neighborhood.

Q. 19. In what direction from that cut did the discovery stake or tree stand?

A. I think it stood in a southwesterly direction or westerly direction.

Q. 20. About how many feet, if you recollect, did that discovery stake stand from the cut in a southerly direction?

A. It stood about 60 feet southerly or southwesterly.

426 Q. 21. Give the dimensions of that cut as you saw it in February, 1876, about the end.

Ans. About 24 feet in length and 8 or 6 feet—perhaps 8 feet—in width. I never measured it.

Q. 22. In what material was that cut run?

A. With the exception, I think, of about 2½ or 3 feet of stripping, it was in quartz.

Q. 23. How deep was that cut at that time?

A. I think the face was perhaps 10 or 11 feet.

Q. 24. What kind of quartz was it run in?

A. A part of iron-stained quartz.

Q. 25. State if you ever prospected any quartz from that cut.

A. No, sir.

Q. 26. State if there was a dump at that cut.

A. Yes, sir.

Q. 27. State the size of that dump.

A. I would suppose there was probably 100 tons of ore. It might not have been that much.

Q. 28. State when you were again on the Bobtail claim after February, 1876.

A. I was over that trail frequently.

Q. 29. State if you observed any other work than that you have described on the Bobtail claim in 1876.

A. Yes, sir.

Q. 30. Describe it, and also where in the spring of 1876 you saw it.

A. It was an open shaft. I think that shaft was there as

427 early as the middle of June, 1876.

Q. 31. Give the dimensions of that shaft when you first saw it.

A. I never was down the shaft, but, judging from the appearance, it was 12 to 15 feet deep, and perhaps 5 to 7 feet in width.

Q. 32. State what kind of material it was sunk in.

A. I suppose in quartz from the appearance of what came out of the shaft.

Q. 33. If you ever prospected any of the quartz that came out of that shaft?

A. I never did, but have seen free gold specimens.

Q. 34. What do you mean when you say you saw free gold specimens?

A. That was rock that shows gold.

Q. 35. State if the free gold specimens which you say you saw were out of that shaft.

A. Well, I think, they were—yes.

Q. 36. State what other work besides the cut and the shaft you have described you saw on the Bobtail claim in 1876.

A. Let me see. I don't think I know any other work except the work that was done upon the open cut and shaft.

Q. 37. State if the shaft you have described was below or above the cut.

Objected to as leading. Ques. withdrawn.

Q. 38. State the location of that shaft with reference to the cut.

428 A. The shaft was in the end of the lower cut.

Q. 39. State the distance of that shaft from the discovery stake which you have described.

A. It might have been 40 or 50 feet—60 feet, perhaps.

Q. 40. In what direction?

A. Well—southerly direction; it might be west of south or south or southwesterly. I don't know. I never put no compass on it.

Q. 41. Estimate the work upon that cut which you have described in the spring of 1876.

A. Well, I don't think I would have done that work for less than $175 *dollars.*

Q. 42. Estimate the work upon the shaft in the spring of 1876.

A. I included the work as on the cut, and I meant to say the two cuts.

Q. 43. You have described a cut and a shaft. Now you say two cuts. Was there a second one?

Objected to as leading & incompetent.

A. Yes, sir.

Q. 44. State upon what part of the Bobtail claim the second cut was.

A. Somewhere between 12 to 15 feet north or in a northerly direction from the cut I have spoken of.

Q. 45. Give its dimensions.

A. Well, it was 5 or 6 feet wide, perhaps 8 or 10 feet long, and might have been less. I never put no tape on it; perhaps
429 about 4 feet in depth in the breast, and it might have been more than that.

Q. 46. What kind of material was it run in?

A. Mostly ore.

Q. 47. Did you ever prospect any of the ore from that cut?

A. No, sir. In the spring of 1876 the first discovery stake of the Bobtail was from 40 to 50 feet in a southerly direction from this cut which I call the discovery cut. Afterwards I saw another discovery shaft about 30 feet south of the first discovery stake. There was a notice on it substantially about the same as on the first. This was in May, or maybe the early part of June.

430 The deposition of JAMES GRANT was next offered in evidence by defendants, and reads as follows:

I resided in Deadwood gulch from February, 1876, until January, '79, and knew the quartz mining claim called the Bobtail lead, near the head and on the east side of Shoemaker gulch. About the first

of May, '76, I was prospecting around there along with Mike Gibbons, Rob Griffin, and Dan Murphy, and we were informed by Frank Raborg that that was the Bobtail ground. I also read the location notice at the Bobtail claim—that is, I read the heading and a portion of the notice and the names signed to it; some of it was quite dim; the names were Ireton and Carey and another that I couldn't make out. The location notice claimed 750 north and 750 feet south, and 300 for sinking or mining purposes; I think that was it. There was considerable work done there at that time. There was a cut run into the hill from 10 to 20 feet long, from 10 to 15 feet deep at the face. The cut—that is, the bottom of the cut at the deep end—was in solid quartz, and, in my judgment as a miner, was an exposure of a quartz vein. There was a stake
431 standing at the head of this cut when we were on that ground in May 4 or 5 feet high, 5 or 6 inches in diameter, blazed on one side, and the notice written on the blazed side of the stake with a pencil. On this occasion Gibbons, Griffin, Murphy, and myself made a location there called the Neptune, and I took down this Bobtail stake, cut off the writing with a knife, and wrote thereon a notice of the location of the Neptune lode, claiming 750 ft. northerly and 750 ft. southerly from that cut, by a width of 150 feet on each side of the discovery. The Bobtail notice was erased by me in the presence of Gibbons, Griffin, and Murphy, Jack Dawson, and Frank Coyle, and I wrote the Neptune notice on it in the presence of the same party and set it up at the mouth of the cut. None of us did any work on the Neptune location. There was also a small shaft west of north of the Bobtail discovery cut. There was a little open cut south of it. The shaft was from 8 to 10 feet deep and was sunk in quartz. The little open cut was from 8 to 12 feet long, and it was sunk in country rock, and at the end were large white quartz boulders about 5 feet deep at the deepest end. The value of the
432 work done when we were there on the Bobtail was about $150.00.

I was again on the ground about a week after that—that is, crossed over it—and then about a month later I know where the Clara No. 2 lode was located by James Harrington, Thomas Mahan, and Michael Gibbons. The location notice of the Neptune lode was never recorded, nor was the claim staked. I told Mahan all about the Neptune location before he located Clara No. 2, and that it was no good. Mike Gibbons was present. This was in McCaffrey's saloon in Deadwood. Gibbons told me that he would shoot me if I gave away the Neptune location. There was a discovery on the Bobtail of ore in these cuts and shafts. The distance between the Bobtail discovery shaft and where the Clara No. 2 shaft was put down [was] about 15 feet.

The reading of the cross-examination of the witness waived by plaintiff.

433 The deposition of HENRY C. HARNEY was then read and introduced in evidence, and was as follows:

I became a resident in Bobtail gulch about the 10th of February, '76, and remained there until about the 12th of December, '77, ex-

cepting 3 months in the summer of '77, that I was absent in Chicago on business. I was engaged in quartz mining, and was interested in the Homestake, Old Abe, Mammoth, Centennial, Golden Terra, and Ophir, and was a locator in all of them, excepting the Golden Terra, in which I purchased my interest. During the year '76 I was acquainted with the location of the Bobtail mine. It was situated on the east side of Shoemaker gulch, in Whitewood quartz mining district, and was an extension of the Gold Run lode. I first knew it on the 23d or 24 of Feb., '76. Mr. Carey was there, and I saw a stake about 4 feet high squared at the top, which he pointed [out] to me as the discovery stake. I also saw him blaze a pine tree as the south end stake, and he pointed out another tree to me which was blazed as the northwest corner stake, and pointed out the
434 direction in which he claimed the mine as running. He was one of the locators, and also a man named Ireton, who was one of the locators, was engaged at the time in marking the boundaries of said Bobtail claim, and Ireton pointed out the stakes of the Bobtail to me and a partner of mine named Fred. Mannuell. There was writing on this discovery stake which Carey put up written with a lead pencil. It was an ordinary mining location notice. I do not remember all the names that were attached to the notice. The mine was claimed as the Bobtail. There was an open cut at the point where the discovery stake stood, and it was run in surface dirt. Porphory was mixed with the surface dirt. There was quartz mixed in the bottom of the cut, and for two feet from the bottom in the face. I never prospected the quartz. I passed over the mine very often after that during the spring and summer of '76, and the trail leading from Gayville to Lead City passed close by the discovery shaft. There was an open cut run there about 5 feet wide and 20 feet long and about 9 feet deep at the face; also a shaft was sunk there about 5x7 feet in diameter and about 12 feet deep. It would
435 cost at least $100.00 to have that work done at that time. This shaft and cut had more quartz in them than the cut I have previously described, and it was more solid. I am acquainted with the general character of the quartz in the Whitewood quartz mining district, and the quartz in the cut near the discovery stake resembled very much in appearance quartz from the discovery shaft of the Old Abe mine and the Clara No. 1 mine, both of which are mineral-bearing, and the quartz in the other workings was about like the mineral-bearing quartz of the district.

Reading of cross-examination waived.

436 The deposition of DAN S. LATHAM was next read and introduced in evidence by defendants, and is as follows:

I came to this county in January, 1876, and in the spring and summer of that year prospected a good deal around the country in the vicinity of Lead City and on the divide between Lead & Central, and became acquainted with the Bobtail mine, on the east side of Shoemaker gulch. As I was returning from Deadwood one day I noticed where there had been some quartz thrown out and went

back next day to locate it, thinking it was jumpable, but I found that there was more work done than I had supposed the day before. I found a shaft sunk there 10 or 12 feet deep and an open cut run in about 10 or 12 feet, maybe farther. The bottom of the cut was 4 or 5 feet wide, and at the upper end the surface was 10 or 12 feet from the bottom of the cut. Both the shaft and cut were in gold-bearing quartz. At that time there was very little hireing done, and but few quartz miners were working for wages. Those
437 *those* hired work done paid from 5 to 10 dollars a foot for sinking a shaft. There was as much as a hundred dollars' worth of work done at that time on the Bobtail. This was the early part of June, and there was a discovery stake and notice on it, standing at the upper end of the big cut, upon the bank close to the cut; it was a hewed stake about 6 inches square, about 4 feet high above the surface. A notice was written on the stake, but I don't remember reading more than the name of the mine in the notice and the men's names. I remember one name, that 1 Tom Carey's; the other men were strangers to me. The name of the mine was the Bobtail. I found that the lawful amount of work was done on it to hold it for a year, so I did not jump it.

438 The deposition of J. H. S. COLEMAN was next introduced in evidence on the part of defendant-, and is as follows:

I resided in the Black Hills of Dakota, at a place called Golden Gate, on Deadwood gulch, from the early winter of '76 until 1878, and was engaged in prospecting, mining, & milling. I had about 13 years' experience in prospecting and mining in Montana, Idaho, Nevada, Utah, and the Black Hills. In the spring of '76 I became acquainted with the Bobtail lode, situated on the east side and near the head of Shoemaker gulch, in Whitewood quartz mining district, Lawrence county, D. T. Some time in April, '76, I made a contract with Mr. Henry S. Ireton, by which Frank Raborg and myself were to sink a shaft for a ⅓ interest in the Bobtail lode. Iron was the only one of the locators that I knew. Raborg and I first run a cut—that is, as I remember it now—into the discovery shaft of the Bobtail about 10 or 12 feet long, near a large quartz boulder. Our cut was about 4 feet deeper than the back end of the dis-
439 covery shaft and was 4 or five feet wide. We then cut further south about 20 feet, and run another cut into the hill 18 or 20 feet long, about 5 or 6 feet wide at the top, and it was about 10 feet deep at the back end or face. At the end of this last cut we sunk a hole from 2 to 4 feet deeper than the cut. The first part of the work was in slide rock; the back end of the cut was in quartz in place. We also started a shaft west of the discovery about 15 feet, just below the trail, but don't remember distinctly the amount of work we did there. We also cleared off the ground and done some work near the south centre end stake of the Bobtail, which was a dead tree, and we both worked there one day preparing a place to sink a shaft. The name of the mine was written on this tree. The value of the work which Raborg and I did there we estimated at over $100.00, and we developed a lode of quartz rocks in place. All

the stakes of the Bobtail that I saw at that time or know anything about was this tree, which was the south centre end stake, and a stake standing at the southeast corner of the mine and a hewed stake lying
440 on the ground just west of the discovery shaft, which Mr. Ireton told me was intended for the discovery stake of the Bobtail mine, I think. He also told me that the tree which had the words "Bobtail mine" written on it was the south centre end stake, and I think he pointed out to me the southeast corner stake. The south centre end tree was about 50 feet southerly from the discovery shaft or cut, which, when I first saw it, was an irregularly-shaped hole dug on the west side of a large quartz boulder to the depth of perhaps 7 or 8 feet. There was an open cut run to it in slide rock and loose detached quartz. The size of the Bobtail claim at that time, according to my best impression, was a full mine 300 feet in width and 1,500 feet in length. The map which I now have in my hand purporting to be a map of the Bobtail lead and conflicting claims is substantially a correct diagram of that claim as I knew it in April [and] May, 1876, and I sign my name and this date to it and attach the same to my deposition.

Diagram is as follows:

[Diagram not in copy.]

No cross-examination.

441 The deposition of ANGUS MCMASTERS was next offered in evidence on the part of defendant- and is as follows:

I have been engaged in gold, silver and copper mining since 1858 and have been engaged in mining here in Lawrence county for nearly four years. I came to this district the fore part of April, 1876, and commenced prospecting and became acquainted with the Bobtail lead between the 24th and 30th of April of that year. A man named Dawson and myself left Deadwood gulch on the 24th and went up Bobtail to the Golden Terra mine. From there we crossed over the divide to the south fork of Gold run, then crossed over Mineral Point to the north fork of Gold run, passed by the Chizum boulder and what is now called the Highland mine and what is now called Clara Hill. I saw what appeared to be solid quartz-rock croppings, and breaking off a piece with a hatchet I saw it contained gold. We then located the Clara mine. Dawson wrote the notice and stuck it up on a stake. We went from there over to the Giant, and then returned and worked that afternoon and the next day on the
442 Clara. While working the next day I saw some one working over in the direction of the Bobtail, and on going over there I found an old gentleman at work; he said his name was Chizum, and that he was working on the Bobtail. He afterwards visited us at our work. Chizum was at work on the upper side of the trail—that is, the trail that leads down Shoemaker gulch, on the right as you go down. I saw no stakes at that time that I remember of of the Bobtail, except the discovery, which stood above the cut where Chizum was at work.

I should judge it was about 4 feet high and temporarily put up, as it leaned to one side; there was a few rocks around the bottom of it. I didn't go to it and don't know if anything was written on it or not. It stood to the east of the head of the cut. I judge that this cut was 3½ or 4 feet wide and 12 to 15 feet from where the ground was broken to the face of the cut; that would make the face 7 or 8 feet deep. For some little distance it was run in earth, float rock, and the balance of it was run in quartz. This man Chizum was one of the locators, and he gave me some specimens to examine
443 out of the cut and asked my opinion about them. Some of them looked very well. I don't remember prospecting any of the pieces at that time. I did afterwards, in May or June, '76; prospected 5 or 6 pounds of the rock out of this cut and got a very light gold prospect. In May, '76, there was a hole sunk in the ground some 15 or 20 feet northerly from this discovery cut of the Bobtail, and my recollection now is that it was oval in form. It was 6 or 7 feet wide on the top; I don't remember its depth, but it was sunk in reddish quartz. There was a discovery of a mineral-bearing vein on the Bobtail at that time. The Clara mine which Dawson & I located is known as Clara No. 1. I estimate the reasonable value of all the work which I saw done on the Bobtail mine prior to the 24th of June, when I left the Hills for a time, at from $175 to $200, as labor was then in that locality, to the best of my recollection. I saw Mr. Chizum at work on the Bobtail claim 3 or 4 times in the spring of 1876.

Cross-examination of witness not read by plaintiff's counsel; reading waived.

444 The deposition of RICHARD COLVIN was then read and introduced in evidence on the part of defendant- and is as follows:

I went to the Black Hills in the spring of '76, and remained there until July, '77, and I began prospecting around that country, and became acquainted with the Bobtail lead in May or June, '76. I prospected a great deal of that hill and became acquainted with some of the boundary stakes of the Bobtail. I knew the 3 north end stakes and the south centre end stake and a stake at the shaft, or cut rather. The south centre end stake was a dead tree. The northwest corner stake of the Bobtail lode was a dead burned tree. The northeast corner stake was a green pine tree, and the north centre end stake, I think, but I won't be positive about that, was a dead tree with the top broken off—a stub. The reason why I know that these were the north end stakes of the Bobtail was because I read on them the name of the location and the names of Ireton, Carey, and Chizum. I saw the work on the Bobtail claim at that time.
445 It was a cut run into the hill and a shaft sunk below the cut. This was at the south end, and within 75 or 80 feet from the south end of the Bobtail claim. A cut was run into the hillside some 2 or 2½ feet, and at the end of the cut there was a hole sunk 3 or 4 feet into the quartz. This cut was 4 to 5 feet wide, and was

run in an easterly direction, and exposed at the bottom all quartz. I have been engaged in mining for 10 years, and in my judgment there was a discovery of a vein or lode of quartz at that point. Below this cut some 25 or 30 feet in a northerly direction there was a shaft some 10 or 15 feet deep sunk in quartz. I prospected the quartz in a mortar and found gold in it. There was also a little hole up the hill sunk in quartz. I do not remember having seen the west side centre stake when I was there prospecting. I should judge that the reasonable value of all the work that I saw done on the Bobtail in May & June, '76, to be worth $225.00. For awhile I was up on that hill every day or two prospecting, and afterwards I went to work on the Giant lode in May or June, '76. I had been acquainted with the Bobtail lode about a month before I
446 went to work on the Giant, and the discovery stake of the Bobtail when I first saw it was this dead pine tree about 75 or 80 feet above and south of the discovery. Afterwards I saw a big hand-made stake which was right above the cut. I noticed on this stake a writing claiming 13 or 14 hundred feet north and 75 feet south. Before the tree was cut down there was a notice on that, and the names of Ireton, Chizum, and Carey were signed to it. I personally knew Carey.

Cross-examination not read by plaintiff.

447 THOMAS E. CAREY was then called as a witness on the part of defendant- and testified as follows:

I came into the Black Hills in Dec., '75, and know the Bobtail mining location on the east side of Shoemaker gulch, in Lawrence county, Dakota Territory. I was one of the original locators, and first became acquainted with it Feb'y 22d, 1876. On that day Ireton and I went up Bobtail and Shoemaker gulches intending to prospect some ground over in Gold Run, and when we came near the top of the divide between Gold run & Shoemaker gulch we noticed some good-looking quartz cropping out there. We agreed to make a location there, and leaving him at that place I proceeded to Gold Run. He failed to make a location that day, and a couple of hours afterwards joined me where I was at work in Gold Run. There was quite a stampede to the gulch the next day, and we went over and the gulch was all staked. The next day Ireton & Chizum came to the gulch to secure claims. He showed me a piece of rock with free gold in it from the Gold Run lode, sometimes called the Chizum
448 boulder, which he had located a little west of south and a little east of north. I was recorder in Gold Run gulch then. It was called the Summit mining district, and I sent Mr. Ireton up to make the Bobtail location. He used for his discovery stake what was afterwards known as the south end centre stake of the Bobtail, upon which he wrote his discovery notice. It was a dead pine tree broken off, I judge, about 40 feet from the ground. The next day we went up in company with Mr. Chizum, whom we had taken in as a partner, and we staked off the claim and did some work. We went up one day afterwards and put in another day's work on what

we considered our discovery shaft, which was on the west side of a large quartz boulder. We run a cut into the hill by the side of that boulder, supposing at the time that we were disclosing a vein of quartz. It since proves to be nothing but a boulder. What work Chizum & Ireton did after this I don't know, as I sold out to them, or to Ireton, a week or ten days afterwards. On the day that I was there we put up 7 stakes in number, 3 at the south end and three at the mouth end, and we changed our notice from the tree
449 at the south end to a stake which we put up at what we considered our discovery shaft; this was about 50 feet distant from the tree; the end centre stake of the Bobtail was this tree, which I have before described. The southeast corner stake was a pitch-pine post which we set up in a mound of rocks; I am not positive whether the southwest corner stake was a green-pine tree or stake, but it is my impression now that it was a green tree, and that we blazed it. The northwest corner was a pretty large dead pine tree 15 to 18 inches in diameter, and perhaps 50 feet in high*th*; it leaned a little to the west. The north centre stake was a pitch-pine post, I think, and the northeast corner stake was a green-pine tree. No one of the locators was delegated to put up the side stakes that I am aware of. The end stakes and the discovery stake are all I have any knowledge of; I don't recollect of ever having seen the south centre end stake standing after May, '76, except the stumps; that point remains just where it was in Feb., '76. The northwest corner stake, the large dead pine tree that I speak of, I saw standing there in November, '77; I don't remember to have seen it since; I
450 am not certain whether it was Nov. or Dec., '77. I visited — late in '77, with Mr. Kello, Mr. Gunn, & Mr. Moore, at the time when Kello made the survey of the Bobtail, and I showed them this tree as the northwest boundary stake of the Bobtail. I was pretty sure it was, although I was not positive that that was the tree; a good many landmarks had been cut down. It was then marked the northwest corner stake of the Bobtail lode, and the writing was so dim I could hardly read it. I am not positive whether any names were on it or not.

Q. 29. How was it about the other two boundary marks on the north end?

A. I never saw them; the timber had been cut down and I did not see them.

Q. 30. Did you see the stump of this green-pine tree?

A. I did not; the timber had been cut away and I could not tell which tree it was.

Q. 31. Do you know when that timber was cut away?

A. I think during the summer of '76, but I am not certain. I think the east side stake of the Bobtail was there. The north centre end stake was marked "north end centre Bobtail lode." The west corner was marked "southwest corner Bobtail lode." The southeast corner stake was marked with the name of the lode, and in every case the name of the lode was marked upon the stake and the designation of the corner. We done about $25.00 worth of work on
451 the claim prior to my selling out. I never prospected the

rock. Immediately under this quartz boulder was the vein of quartz. We did not at that time go down through the detached quartz to the vein. I considered the boulder a part of the vein; it might be termed the cropping. The value of the work done by us at the Discovery, irrespective of the time engaged in surveying & staking the ground, was perhaps $15.00. We did four days' work in all. There was a additional work done there after I sold out. I don't know whether Ireton & Chizum did any of it or not. The first notice was put up on the tree on the south end of the claim. The second notice, the discovery notice, was put immediately after the discovery shaft on a pitch-pine stump by Mr. Chizum, in the presence of Ireton and me. The stump was blazed and the notice was written on the wood. I should have said a pitch-pine post or stake, not a stump. I hewed the stake myself while it was lying on the ground. I dressed [it] for Chizum to write on. I do not know what has become of it. I have not seen it since April, '76. The notice of this stake claimed 1,500 feet northerly and southerly on what we call the Bobtail lode, and I think 300 feet on each side; I am not positive of it, but I think that is what we claimed. The names of Chizum & Ireton and myself were to that notice.

452 I do not recollect of having seen any of the boundary stakes of the Bobtail, except the northwest corner and the south centre end stake, during the summer of 1876, nor the hewn discovery stake after April, 1876. It then stood from 4 to 6 feet east of the cut and e-sterly of the trail. I was on the ground in July, and noticed that work had been done there since I sold out. Quite a lot of quartz was thrown out, and I should say that there had been as much as 15 or 20 days' additional work done there; it might have been more. The ordinary wages at that time for quartz-miners who furnished their own tools and boarded themselves was from four to six dollars a day. Late in the year 1877 I was requested by Thos. F. Mahan to go and show the original stakes of the Bobtail to Surveyor Kello, and I went up there and showed him those two, which were all that I could show at the time—that is, the south centre end stake and the northwest corner stake which I have described. Some opposition was offered *by* the surveyor by conflicting claimants, and I went home soon after showing him the stakes. I

453 showed him as nearly as I could where the discovery shaft of the Bobtail was, but the discovery stake was not to be found. I showed him the stump that remained of the south centre end stake & the northwest corner, which was the dead tree that I spoke of. The discovery of the Bobtail was on the west side of the hill, which formed quite a bend there and considerable of a ravine running below it. As we staked the claim it ran across that ravine, which was irregular and put down into Shoemaker gulch; there was a great deal of fell- timber in it; there was very little green timber on the claim; there was some near the southwest corner and some near the northeast corner. The claim was high at both ends, and the lowest part of the claim is in the middle. The hillside is steep and slopes towards the west into Shoemaker gulch, and a ravine puts down from the mountain on the east, and the

Caledonia discovery shaft is in or near this ravine; the land rises from the Caledonia shaft towards the east; to the south and the southeast it descends a little and then rises to the divide between Shoemaker and Gold Run; to the north of the Caledonia shaft
454 it rises again to the end of the Bobtail; a sort of a semicircle is formed by the hill from the north end of the Bobtail running around in a southeasterly direction and then northerly to the south end of the Bobtail; it is several hundred feet *to* the summit of the hill to the east line of the Bobtail. I showed Kello the remains of the identical stump that formed the south centre end stake of the Bobtail and the identical locality where the Bobtail shaft was located and the identical dead pine tree that formed the northwest corner stake of the Bobtail.

On cross-examination the witness further testified as follows:

My deposition has already been taken in this case twice, once by the pl'ff- and once by the def't. I know where the original north centre end stake of the Gold Run claim stood—that is, the old original; it was this identical tree that I have described as being the south centre end stake of the Bobtail. I am positive of this. I saw the Gold Run notice upon it on the south side at the time that we marked it as the south centre end stake of the Bobtail,
455 on the 22d of February, 1876, and I have been positive of this fact since that time. In my deposition given heretofore I have stated that the south centre end stake of the Bobtail was the same stake or tree that marked the north centre end stake of the Gold Run. I say positively that the north end stakes of the Bobtail location were established by Mr. Ireton & myself. Chizum was at the time working at the discovery shaft, and when Chizum wrote the notice on the stake which I hewed I was there and digging around the boulder, and I saw the notice after it was written, and I passed by it several times within the next few days; I do not think I ever read it afterwards. The discovery of the Gold Run, I should say, was about 750 feet from this south centre end stake of the Bobtail. I have had no interest or anything to do with the Bobtail since I sold out, except to point out those stakes to Mr. Kello. I frequently went by the south centre end stake. Ireton and I were first interested in it as the locators and Chizum was taken in the next day. I was not present when Ireton put
456 up the first notice on the tree before spoken of. He marked that tree before we let Chizum in. Mr. Chizum himself was with us at the time that we settled on the direction that the lode ran, and pointed out to us the direction as near as his judgment could tell, and we followed it in nearly a straight line north; followed the porphiry, which he said had been upheaved by some lode underneath, and took that as the line to run by. Neither Ireton or myself knew anything about quartz mining or veins, while Chizum was an old quartz-miner; I believe we let him into the location on that account and before we staked its boundaries and left him to determine the supposed course of the lode, and he gave us directions in what course to stake it and had more to do with that

claim as to giving directions concerning it than either Ireton or I, or both of us. We did not have two south centre end stakes that I know of, nor do I know that Ireton has established any other stake outside of this south centre end stake as the south end of the Bobtail before we let Chizum in; I don't think he did; all that I ever found or knew was this tree and that was all he ever spoke to me about. W-en I went on the ground in December, '77, it was with Mr. Mahan, and I found Mr. Kello and his assistants
457 there. When we went to the northwest corner it may be said that I took Mahan to the tree, although we walked abreast, to the best of my recollection. Kello went with us, and I pointed out this tree to him as the northwest corner stake, but not with positiveness. I will not positively swear now that that was the tree, but that was my recollection. That was my opinion then, and that is my opinion now. There had been trees standing there at the time that we made the location that had been cut down. I had never been to this tree that we blazed and marked as the northwest corner of the Bobtail from the time we located the claim until I went to show it to Kello. Mr. Ireton got the notice recorded. I do not know who wrote it. It is my recollection that we staked the Bobtail originally 600 feet wide, but Mr. Ireton afterwards told me that he had ascertained that we could hold but 300 feet in width, and that he had left some of the stakes standing as they originally were, and changed the others. This was in March, '76.

458 Q. 77. You say that you adopted—that you made the north centre end stake of the Gold Run the south centre end stake of the Bobtail. Did you make your south end line the same as the north end line of the Gold Run?

A. We did.

Q. 78. How close to the northwest corner stake of the Gold Run did the southwest corner stake of the Bobtail stand?

A. They were set very close together. The same rocks helped to support both stakes.

Q. 79. How far from the northeast corner of the Gold Run was the southeast corner of the Bobtail?

A. Probably within a foot. The same mound of rocks helped to support both stakes.

Q. 80. Mr. Chizum had just a day or two before that located the Gold Run claim?

A. He had.

Q. 81. Was it not understood that he was taking up what was practically an extension of the Gold Run claim?

A. It was. I said the same mound of rocks helped to support the stakes in both cases. The same mound helped to support the northeast corner of the Bobtail and the northeast corner of the Gold Run, but about the southwest end of the Bobtail lode and the northwest of the Gold Run. I am not positive as to what that stake was. I have but a faint recollection as to the southwest
459 corner of the Bobtail lead—as to whether it was a tree or a stake.

Q. 82. Was it the same stake as the Golden Run notice was on or a different one?

A. A different one.

Q. 83. How was it on the southeast corner of the Bobtail; was that the same stake as the Gold Run?

A. It was not.

Q. 84. How close did they stand together?

A. Within a foot.

Q. 85. Did Chizum go with you down to the Chizum boulder and direct the course?

A. Yes, sir.

Q. 86. You aimed to get just as near a line as you could?

A. We did.

460 On redirect examination the witness further testified:

It was in March, 1876, after I had sold out, that I had this conversation with Ireton about his restaking the claim 300 feet wide. I think I sold to Ireton alone. The bill of sale written upon the leaf of a memorandum book and its execution was witnessed by E. B. Barker and Francis Malloy. I tore the leaf out of the book.

461 THOMAS F. MAHAN was then called as a witness on the part of defendant and testified as follows:

I reside in Lead City, and have lived in this country since March, '76; I am engaged in mining and in the stock business; have a herd of cattle here; I know the Bobtail location, and first became acquainted with it in the latter part of July, 1876.

Q. 6. How did you become acquainted with the Bobtail? Just relate in your own way to the court.

A. Through the information of Jack Dawson and Frank Coyle.

Q. 7. Where did they inform you of it?

A. We camped in Shoemaker gulch in July, '76, and Frank Coyle and Jack Dawson informed me of the Bobtail mine after the 6th of July.

Q. 8. State the circumstances under which they informed you of it.

A. Mike Gibbons made a location called the Neptune, and James Grant and a man by the name of Griffin and Murphy and Grant. Grant & Murphy did not want to go to work on it, and they wanted to give me an interest in it, and Gibbons wanted me to go up and work on it; he told me Jack Dawson owned a claim called
462 the Clara No. 1, and Angus McMasters, whom I knew before that, and I went over and saw Griffin & Murphy to know if they would *did* their interest to me in the Neptune, and Griffin said he would, and Murphy and Gibbons told me that James Harrington, a man of business here, would go in with us and him and I would go up to work on it. The Neptune was not recorded at that time. They made the location some time about the 9th of June, 1876, and I went up there the 6th of July—on the 5th day, rather—and I got Jack Dawson to copy, as he was acquainted with the locality of the country there—to write out a notice, and Gibbons instructed me to call it Clara No. 2. I

don't know whether Jack Dawson wrote it or I wrote it, but he dictated it; any way it was done by his instructions, and on the 5th day of July I came down and had it recorded and took dinner with Jack Dawson. I found there a shaft and an open cut and the Neptune discovery stake, on which was a mining notice signed by Mike Gibbons, James Grant, Daniel Murphy, and Robert Griffin. It claimed 750 feet each way from the discovery in length and 150 feet in width on each side. It was claimed northerly and southerly.

Q. 19. What did you do after finding that notice and stake there?

463 A. With the instructions of Griffin and Gibbons and these parties who gave me the liberty to go there and take that the Clara mine was the only mine known there of any note. I was instructed by Gibbons and Harrington to throw that stake away and put up Clara No. 2, and dated it as the 9th of June.

Q. 20. The date of their location?

A. The date of their location.

Q. 21. Did you do so?

A. I did.

Q. 22. Whose names did you attach as locators of the Clara No. 2?

A. Mike Gibbons, James Harrington, and myself.

Q. 23. Three names?

A. Yes, sir.

Q. 24. What did you do after doing that?

A. I had it recorded in Gayville.

By COURT: What was that date?

A. That was the 5th day of July.

By same: What was the date you put on the notice?

A. I put on the 9th day of June.

Q. 25. Waat did you do in regard [to] staking it?

A. We did not stake it for some time afterwards.

Q. 26. Did you do any work there?

A. I went to work on the 6th day. I moved up that day and camped with Jack Dawson and Frank Coyle in Shoemaker gulch.

464 Q. 27. What work did you understand that to be that was there when you went there?

A. Well, Mike Gibbons told me he had a location there; there was a good deal of work done there.

Q. 28. Where did Gibbons tell you this?

A. Down here in James Harrington's house.

Q. 29. Here in Deadwood?

A. Yes, sir.

Q. 30. How much work did you do there before you ascertained from Jack Dawson and Angus McMaster that the Bobtail location had been made there before that?

A. I was not working over a day there when Frank Coyle began to joke me about it; said there was an old man by the name of Chizum would come up and put me off.

Q. 31. Did he give you any reason?

A. No, sir; he did not; I came down & asked Mike Gibbons, who

done that work; he told me to say nothing about it, and go on and go to work.

Q. 32. What did you do then?

A. I kept to work there until the next Sunday.

Q. 33. When you found out there was a Bobtail location there what did you do?

A. I began to look around for the owners.

Q. 34. Well, what did you find?

A. It was rather difficult for me to find him; at least it appeared so to me at the time, although they were right in the county;

465 found that his name was Ireton; I did not find him until some time in November, or before the Wolf Mountain stampede. He said he had spent $150.00 on that ground, and he wanted to get that money out of it; think at that time — gave me a memorandum or a bill of sale, but I paid him nothing at the time, but promised to pay him $150.00, which I have done. After he returned from the Wolf Mountain stampede, for some time, and on the 4th of March, '77, I went over — had a talk with him, and he got Judge Murphy to draw a deed to me of the Bobtail lead, signed by himself, and also signed by him as the attorney-in-fact of D. G. Chizum. This was on Sunday. (Here witness shown deed, hereto attached and marked Defendant's Exhibit —.) This is the document; I saw him sign it; it is in the handwriting of Murphy, and he delivered it to me on Sunday, March 4th, 1877.

466 Q. 53. What did you do on the ground that you were negotiating for with Ireton from November until this deed was executed?

A. I had made negotiations in the fall with this man Ireton. I had a bill of sale in my pocket-book, and to make it more substantial I gave five dollars to Judge Murphy to make a good substantial deed and put it on the records.

(Here deed was offered in evidence as conveying Ireton's interest only and was in the words and figures following:)

467 DEFENDANTS' EXHIBIT.

This indenture, made this fifth day of December, A. D. 1876, between H. S. Ireton and D. G. Chizum, by H. S. Ireton, his attorney-in-fact, of Lawrence county, Territory of Dakota, the party of the first part, and Thomas F. Mahan, of the same place, the party of the second part, witnesseth, That the party of the first part, for and in consideration of the sum of fifteen hundred dollars, lawful money of the United States, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, conveyed, and quit-claimed, and by these presents do grant, bargain, sell, convey, and quit-claim, unto the said party of the second part all and singular their rights, title, interest, claim, and demand whatsoever of, in, and to fifteen hundred (1,500) feet in length by three hundred feet in width of that certain quartz, claim, vein, lode, or deposit known as and called the Bobtail lead, and being the entire interest of the party of the first part of, in, and

to said lode or vein. Said lead, lode, or vein is situate in
468 Gold Run, Whitewood mining district, Lawrence county, Territory of Dakota, and commencing at the northeast end of Gold Run lead and thence running fifteen hundred feet in a northeasterly direction, located February 24th, A. D. 1876, and recorded in book 1, page 2, of the mining records of Whitewood mining district, together with all the veins, leads, deposits, ores and mineral therein contained; to have and to hold the same unto the said party of the second part, his heirs and assigns, forever.

In witness whereof the said parties of the first part have hereunto set their hands and seals this the day and year first above written.

H. S. IRETON. [SEAL.]
D. G. CHIZUM, [SEAL.]
By H. S. IRETON,
His Attorney-in-Fact.

Signed, sealed, and delivered in the presence of—
THOS. H. CARR.
JAMES WERTZ.

TERRITORY OF DAKOTA, }
Lawrence County, } *ss:*

Be it known that on this 12th day of August, A. D. 1878, before me, A. R. Z. Dawson, clerk of the district court in and for said
469 county and Territory, appeared H. S. Ireton, personally known to me to be the person whose name is subscribed to the deed hereunto attached and dated Dec. 5th, 1876, conveying to Thomas F. Mahan all his interest in what is known as the Bobtail lode, in said county and Territory, and acknowledged to me that he executed the same.

Witness my hand and official seal this 12th day of August, A. D. 1878.

[SEAL.] A. R. Z. DAWSON,
Clerk District Court, Lawrence County.

Deed. H. S. Ireton and D. G. Chizum to Thos. F. Mahan, Dated Dec. 5, 1876.

TERRITORY OF DAK., *Lawrence County:*

Filed in my office at 1 p. m., this 2d day of March, 1878, and duly recorded in book H, page 235–6.

C. H. McKINNIS, *Recorder.*

Deed. Ireton and Chizum to T. F. Mahan.

Filed for record at 1.10 p. m. on the 12th day of August,
470 1878, and recorded in book 18, page 516.

C. H. McKINNIS, *Recorder.*

Deed. Ireton and Chizum to T. F. Mahan.

TERRITORY OF DAKOTA, } ss:
County of Lawrence, }

I hereby certify that this instrument was filed for record in my office at 2.35 o'clock p. m., Nov. 4, 1879, and is duly recorded in book 5, page 206.

C. H. McKINNIS,
Register of Deeds.

I know D. G. Chizum, and I purchased his interest in the Bobtail lode on the 14th day of October, 1878, from him in the State of Iowa. (Here the witness was handed a paper purporting to be a deed from Chizum to Mahan.) This is the deed which I received from him at that time.

Deed from Chizum to Mahan offered in evidence and is as follows, to wit:

471 DEFENDANTS' EXHIBIT.

This indenture, made the 14th day of October, in the year of our Lord one thousand eight hundred and seventy-eight, between D. G. Chizum, of the county of Jefferson and State of Iowa, party of the first part, and Thomas F. Mahan, of the county of Lawrence and Territory of Dakota, party of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of twenty-five dollars, lawful money of the United States of America, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, remised, released, and forever quit-claimed, and by these presents does grant, bargain, sell, remise, release, and forever quit-claim unto the said party of the second part, and to his heirs and assigns, all my right, title, interest, claim, and demand in and to that certain mining location and quartz mining claim known as the Bobtail lead, located February 24, 1876, by H. S. Ireton, D. G. Chizum, and Thos. E. Carey, situate near the head of Shoemaker gulch, in the Whitewood quartz mining district, Lawrence county,
472 Dakota Territory, being fifteen hundred feet in length, more or less, in a northerly and southerly direction, by three hundred feet in width, together with all the dips, spurs, and angles; and also all the metals, ores, gold and silver bearing quartz rock, and earth therein, and all the rights, privileges, and franchises thereto incident, appendant, and appurtenant or therewith usually had and enjoyed, and also all and singular the tenements, hereditaments, and appurtenances thereto belonging or in anywise appertaining, and the rents, issues, and profits thereof, and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part of, in, or to the said premises and every part and parcel thereof, with the appurtenances; to have and to hold all and singular the said premises, together with the appurtenances and privileges thereto incident, unto the said party of the second part, his heirs and assigns, forever.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

DANIEL G. CHIZUM. [SEAL.]

473 Signed, sealed, and delivered in presence of—
CHARLOTTE KRITZLER.
MRS. G. A. AUKRUH.

STATE OF IOWA, }
County of Lawrence, } *ss*:

I, J. J. Kritzler, a notary public [in] and for said county and State aforesaid, do hereby certify that Daniel G. Chizum, who is personally known to me as the person whose name is subscribed to the annexed deed, appeared before me this day in person and acknowledged that he signed, sealed, and delivered the said instrument of writing as his free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and official seal this 14th day of October, A. D. 1878.

[SEAL.] J. J. KRITZLER,
Notary Public.

474 When I met Gibbons, Murphy, and Griffin the 4th of July, '76, James Grant was along, and I found these four names on the Neptune stake on the following day. None of the Neptune locators authorized me to go on the Neptune ground except Gibbons. Grant told me not to go. The other two, Griffin and Murphy, were willing to give me their interest, whatever interest they had, if it would amount to anything. I had done considerable work there.

Q. 9. About how much?

A. I worked there—I don't recollect how many days, but several days; squared up the cut.

Q. 10. What was the value of the work you done there?

A. I could not say what was the exact value.

Q. 11. Give your best judgment of the value of the work done by you on the Clara No. 2 in making that location.

A. I would work some days there and would stop and go around and prospect for other mines.

Q. 12. Was it as much as one hundred dollars?

A. It might be.

Q. 13. What is your opinion on that?

475 A. I expect it was. Besides this, Gibbons and myself let a contract to Mathew Moore and William Gunn to sink the Clara No. 2 shaft 35 or 40 feet, for which we were to give them $\frac{2}{5}$ of the mine, and they sank that shaft. From what I subsequently learned, this Clara No. 2 shaft is in the neighborhood of 18 or 20 feet distant from the Bobtail discovery shaft in a southwesterly direction, and it is down in very hard quartz, from the very top down to where they quit. This shaft was started at the end of the cut, and I could not reach the top of the ground with my hand when standing at the back end of the cut. The top of this cut was in

broken quartz and the bottom, at the back end, in solid quartz. I
am now familiar with the character of quartz veins in that
476 section of the country, and know the Clara No. 2 shaft was
sunk upon a vein, the width of which I do not know. It has been cross-cut to the extent of 140 feet, and its direction is northerly and southerly. The Bobtail discovery was right on that vein, about the centre of it, as far as we know. I commenced work on the Bobtail lead to represent it in the month of February, '77, and did considerable work there in February and March. I employed a man by name of Andrew Kirckpatrick to work with me part of the time. He did not work very long. I do not know where he is now. I first commenced work on the Bobtail somewhere about the middle of February, and was there at work pretty nigh every day after I commenced down to about the 20th of March, when Billy Gunn & Matty Moore commenced work on the Clara. Some days I would work there a while then go to where the Queen of the Hills was. I also owned in the Queen of the Hills and worked there by turns. I was down here in Deadwood on the 14th of March when Jabez Chase, superintendent of the Hidden Treasure, got a dispatch that all claims had to
be recorded. It purported to be some advise from Washington,
477 and Scotty Jenks, a brother-in-law of Luke Vorhees, informed
me about it. I also heard Chase say that he had a telegram to that effect, but whether he said from Washington or not, I don't remember. I soon after *I* met Mike Gibbons and told him about this, and he said that there was nothing in it, and that he did not think the Government would take any advantage of any technicalities like the Indian reservation question. I then went right up to Gayville to the mining recorder's office and met Judge Murphy and Tom Hanley there and a young man who use- to be down here to work with Jehmme Swift afterwards; his name is Tom Brutty. I told this young man I wanted to relocate the Bobtail, and I asked him to make out the papers. He did so, and I paid him. Tommy Carr was there at the time, and a good many were going in and out. I don't know whether I got the papers that day or the next. I know I went back the next day and relocated the Queen of the
Hills, and I know that I put up the relocation, noting a day
478 or so after I got them from the deputy recorder. I put the
Bobtail notice right above the discovery; tacked it on a stake. It was written on paper, and I tacked the paper on the stake. I saw it there afterwards two or three times that I remember. I worked along there on the Bobtail until late in the month, when Mattie Moore and Billy Gunn went to work on Clara No. 2. They worked down in a shaft. I have not a copy of that notice. This young man, Tom Brutley, told me that it was recorded, and I got a copy of it afterwards and put it on the county records. The relocation notice that I put on the Bobtail was dated the 14th or 15th of March—I don't know which. The original location was first put on and then he put a supplementary location under it. The first location was as it appeared on the mining records. The supplementary location was dated the 14th or 15th of March, and was signed with name Thos. F. Mahan. About the 20th of March

Billy Gunn and Mattie Moore came to the Clara No. 2 to work, and I continued working there off and on until about the first of April. I was living at the time in Lead City.
479 A person working at the Bobtail discovery or at the Clara No. 2 shaft would have a view of the whole of Shoemaker gulch as far as the north end of Bobtail, with the exception of the northeast corner, which lapped a little over the ridge, and could see the Caledonia stump and discovery. I saw two parties at work there in Feb. & March, prior to the 20th of March; one was running the Bobtail tunnel on the west side of Shoemaker. There was Hen. McMasters and Mike Holland. The other party was right west of me on the hill, on the Santa Cruz mine. I do not recollect seeing any body at work at the Caledonia shaft from the middle of Feb. until about the 20th of March; there might have been parties at work at the bottom of the shaft and I not see them, but it they were at work on top or on the dump during that time I would have seen them. I saw no one passing by on the trail who appeared to be working on the Caledonia, but I remember several persons passed by during the period that I was working on the Bobtail. It was a public
480 trail. I remember Tom Hanley passing there one day and James Manning. I talked with both of them. I also remember a man by the name of John Green and a man named Pat. Cavanaugh passing by there. I believe that W. L. Farkett and Ham. Utley and a Mr. Stone also passed there while I was at work; I recollect also that Robert McCleary, of the Santa Cruz mine, passed there one day; he is a medium-sized man, dark complexion; also remember that C. F. Thompson, ex-county treasurer, and John Boroughs, of the register of deed'- office, passed there, and Capt. Burns, while I was at work there. I don't remember the dates when these gentlemen passed or the trail by where I was at work, but it was during the time that I was representing the Bobtail. I had another man working with me for awhile there besides Kirckpatrick, whose name I do not recollect; he was a small, sandy-complexion- man, and had been around at lead; he did not work there very long. The ground was frozen hard and we did
481 not make much progress with the work. The condition of the Bobtail shaft did not remain the same as when I first saw it. We had graded it off and filled it up, and it is now under the dump of the Clara No. 2. An armed guard has been kept there by the Caledonia Company for the past year or so to prevent any one going into the Clara No. 2 shaft. After I bought out Ireton, Billy Gunn and I went over to the north end one day in the spring, and we saw two of the north end stakes. These were the centre & the northwest corner stake. The northwest corner stake was a big dead pine tree about 15 inches through. My best recollection is that the time was about the 1st of April and after they had gone to work on Clara No. 2, for I was ready to give them a deed for part of the Bobtail, which I had agreed to do. This tree was in a northerly or northeasterly direction from the Caledonia discovery shaft, quite a distance. The reason that we knew that it was the northwest corner stake of the Bobtail was because we found written on it that it was

the northwest corner of the Bobtail in pencil; the writing
482 was very old and dim; I can't say whether Gunn read it or not, but I did. This was the same stake to which Kello surveyed as the northwest corner stake of the Bobtail in the latter part of December, '77; I am certain of that. The north centre end stake was a dead pine with rock piled around the bottom of it. It was blazed and some writing was on it, but I could not make out the words, except the Bobtail. It stood in an easterly direction from the northwest corner. I am unable to say whether it was rooted in the ground or merely set up and the rocks piled around it. Its diameter might be about 10 inches, and I think it was about 8 or 10 feet high. The northwest corner was as much as 30 or 40 feet high. The distance between these two stakes, as near as I was able to judge, was about 150 feet. I did not see the northeast corner stake on that day that I remember of. The north centre end stake of the Kello survey in Dec., '77, is in about the same place, but the old stake had disappeared before Kello made the survey. The northwest corner also disappeared shortly after Kello made
483 his survey. There is no appearance of it or the roots there now. It seems to have been excavated and the whole thing removed. I do not know by whom this was done. I was around there again in May, '77, in company with John Noonan, the defendant in this action, showing him the boundaries of the Bobtail. We found the west side centre stake southwesterly from the Caledonia shaft, near a little ravine that comes down from the Queen of the Hills. It was a hewed stake and was distant 75 or 100 feet from the Caledonia discovery shaft. We also found these two stakes that I have described on the north end and the south centre end stake, which was a black dead pine tree. I first saw that there the fall of '76. It was cut down in '77, and the stump remains there now. I don't know just when it was cut down. I first saw this tree in June, '76, and the south centre end, with Bobtail written on it; saw it again during the winter following and along towards spring. There were several dead trees there in that locality. I don't know by whom it was cut down. I may be mistaken as [to] the time when it was cut down, but a part of this tree remains there
484 yet. I did not see the east side line centre stake prior to the Kello survey, but I believe I did see the southwest corner. That would be on the right of the trail going south. My recollection of that is that it was a pine tree seven or eight inches in diameter. It was blazed and marked southwest corner stake, Bobtail. It was just about 150 feet in a westerly direction from the tree I speak of as the south centre of the Bobtail. This was about April or May of '77. I know it was in the spring. The blaze was an old one, and the pitch had oozed over the pencil writing. I do not remember to have seen the southeast stake nor the east side centre stake.

485 Q. 79. After you got this bill of sale written into your little book and signed by Ireton what did you then do with reference to this Bobtail location?

A. Do how?

Q. 80. Well, as to exercising any act of ownership over it?

A. I don't know what you mean.

Q. 81. Did you make any contracts or agreements by which to transfer any interest in the Bobtail lead to other parties?

A. I had a conversation with Moore and Gunn.

Q. 82. Mattie Moore and Billy Gunn?

A. Yes, sir.

Q. 83. What time was that?

A. During the spring of '77.

Q. 84. What did you say to them?

A. I told them I would deed to them the $\frac{2}{5}$ of what was inside of the Clara No. 2 stakes.

Q. 85. In consideration of what?

A. Of the amount of money that it would cost me.

Q. 86. Did you have any conversation with anybody else about the matter who was interested in that locality?

A. Not that I recollect of now.

Q. 87. When was this understanding had with Moore and Gunn that you were to give them an interest in the Bobtail?

A. We had talked of it several times.

486 Q. 88. How soon after you made the agreement with Ireton in November did you apprize them of the fact that you had purchased it?

A. I did not tell them much about it.

Q. 89. Did you tell any one else about it?

A. Yes, sir.

Q. 90. Who?

A. Jack McMarbery.

Q. 91. Anybody else that you recall?

A. I don't know; I told some several about it, but I don't recollect now. All I know about Ireton being attorney-in-fact for Chizum was what he told me. Judge Murphy drew the deed

487 and Ireton signed it as attorney-in-fact for Chizum. I continued an owner in the Bobtail until some time in the spring of '78, when I sold out to John Noonan, the defendant. He and I had possession of it all the time; we were partners. In '77 we run a tunnel on the Bobtail claim, right west of and below where the discovery is. The tunnel was run by Mattie Moore and Billy Gunn, and it was called the Bobtail tunnel. I made a contract with them by which I was to give them a certain interest in the Bobtail claim for my proportion of the cost of running the tunnel, and in the winter following I offered them the deed here in Deadwood, in General Dawson's office, and they refused to accept it. At that time they had their interest in the Clara No. 2 bounded to Mr. Farrish, and *that* they insisted on me paying them the money for my proportion of the cost of this Bobtail tunnel. I gave them an order for the money on John Manning, and they went and got it. The tunnel was run in 80 or 90 feet and they claimed something over $500.00 for the work, and I paid them my proportion of the work,

488 besides paying Gunn & Moore my proportion of the cost of this Bobtail tunnel work. I had done a couple of hundred dollars' worth of additional work on the Bobtail in the year

1877, after the 28 of February. Before Kello made the official survey of the Bobtail he satisfied himself that there was not less than $500.00 worth of work and improvement done upon the Bobtail claim. Mattie Moore and Billy Gunn showed him the work, and showed him this Bobtail tunnel as a part of the work done on this claim. This was before I tendered them the deed. They changed their mind subsequently. In 1878 I did not less than $100.00 or $150.00 worth of work on the Bobtail right where the discovery was. I had a man named John Green, one named J. C. Murphy, one, Jerry Cariso, and one Frank Goody, and some others working there for me. After I paid Gunn & Moore for the Bobtail tunnel work our relations changed somewhat, and when I was having this work done in '78, in January and February, they run off my men 3 or 4 times. I did the work, nevertheless, and kept men at work both night and day, so as to do over a hundred dollars' worth of
489 work. In '79, in order to avoid the trouble I had the year before with conflicting claimants running off and threatening my men, I put 15 or 20 men at work there, under a foreman and they worked there all one day and night and did $100 worth of work. The work for both '78 and '79 was done in January & February, right there at the discovery. I took receipts for the work from the man, and it cost me more than $150.00 each time. Before putting this body of men to work I had two men working there for a few days, and who had been driven off. I cannot state exactly the value of the work which I have since had done on the Bobtail, but it is worth not far from $20,000.00—maybe more. This last work has all been done since we bonded the mine to J. F. Gilmer, and it is in a northerly direction from the discovery, near the Caledonia workings. I first sunk a shaft, then drifted from the bottom of it and stoped out ore. I do not know how much ore I have out, but there is a good deal, and the mine is in very good shape for working. Some of this work is on the ground now in dispute—on what is called "The Queen of the Hills." The Caledonia com-
490 pany claims to own $\frac{3}{5}$ of the Queen of the Hills. The work is not on nor within the limits of the Caledonia location, but is outside.

491 On cross-examination the witness MAHAN further testified as follows:

I first came to the Black Hills the last of Feb. or first of March, '76; came to Deadwood in April, and in a little while thereafter went out to the Little Missouri stampede. I remained around Deadwood until I went out on that stampede, and returned back here from the Little Missouri about the early part of June. It was some time after I went to work on the Clara No. 2 that I took up with the idea that the tree about 75 feet south of the Bobtail discovery was the north end stake [of] the Gold Run. I went to work first there in July, but I don't know how long afterwards it was that this tree was shown to me as the north end stake of the Gold Run and the south end stake of the Bobtail by Frank Coyle. I was working on the Clara No. 2 at the time, and there were two inscriptions on it—the

south centre end stake of the Bobtail on one side and the north end centre end stake of the Gold Run on the other. I think the time was in July. I think about the 9th of June I was over that
492 ground with Frank Coyle, Angus McMasters, and Jack Dawson, but not where the Bobtail discovery is, and I was not back there again until the 5th of July. I knew nothing about the Neptune location until Mike Gibbon informed me, and when I went there and located the Clara No. 2 I took down the Neptune stake, cut off the inscription, and put it up as the Clara No. 2 stake. I remember very well the post on Giant Hill and the row between the Giant owners and the Clara No. 1 people. I was there at the invitation of the Clara No. 1 owners to help them defend against the Giant owners. The Giant owners claimed a part of the ground covered by the Clara No. 2 location, and put a notice in the paper. I was there to help the boys to protect the Clara No. 1, and also to protect the Clara No. 2. I think James Grant said something about the Bobtail on the 4th of July, 1876, but I don't know that this fact influenced me in any way in going up there at the time. I did not pay any attention to the Bobtail until after I got there, when I think Frank Coyle said something about it. There were about 20 men there at the forts. John Flaherty brought Ireton up there. The men had arms and many of them were drunk, and it would not be a safe thing then for any one to make an adverse claim to ground on that hill. John Goddard also came with Ireton, and there was considerable said about the Gay or Giant party coming up there to clean out the crowd. I think there was some-
493 thing said about the Bobtail, and we knew that Ireton was in with — Gay party; that the men who owned the old titles on the hill were standing in together. It was understood among our party that Ireton was coming up there, and that Flaherty would bring him. He did not come there to fight, nor did Flaherty, nor Goddard. They came there as peacemakers, and one of them came in at a time. They desired to settle the controversy peaceably. We gave them a drink, and they passed on down to Lead — after they stated they wanted some of the leaders of our party to go down to Lead City and have a talk and settle matters peaceably until law was established in the country. We halted these men as they approached the fort, and guns were drawn on them, but after halting them no hostility was displayed. I did not hear Ireton say much about the Bobtail, but Flaherty said while Ireton was there: "Here is the man that owns the Bobtail, an old claim on this hill." Gibbons & I were then cabining on Gold Run. He was there on the hill at the time. I did not consider nor understand that
494 Ireton at that time had abandoned the Bobtail, but shortly after that I began looking him up for the purpose of negotiating for the Bobtail, and found him at South Bend. I don't know how long afterwards, but I should judge a month or six weeks. I did not know him before he came on the hill. I spoke to him about the Bobtail the first time. I saw him afterwards and enquired what he was going to do about it, and he said that as soon as law was established in the country and he could go on the hill

safely he would work it. I offered to buy it then, but do not know how much I offered. He said he was out $150 on it at that time. I got a bill of sale of some writing from him, I think, about the 5th of December. I wrote in a memorandum book which I had, and I believe he signed, and I agreed to pay him $150 for it, $50 in October, '77, and $100 when I would sell the mine. I had bounded the Clara No. 2 to Capt. Richards some time in October, 1876. I do not know where the book is in which this bill of sale is
495 written. I had no use for that bill of sale after Judge Murphy drew the deed the fore part of March, '77.

Q. 213. How long ago is it [since] you saw that last?

A. I could not tell.

Q. 214. What kind of a book was it?

A. A small book.

Q. 215. Describe it.

A. It was about as thick as one of them.

(Witness here shows a book.)

Q. 216. A little memorandum book, was it?

A. Yes, sir.

Q. 217. You say positive that Ireton signed it at that time?

A. Yes, sir; I think he did. We made the arrangement there.

Q. 218. Do you swear positive that you did get a bill of sale from Ireton any time in the fall of '76?

A. I think I did.

Q. 219 You won't swear to it positive?

A. I know we had the arrangement distinctly made.

Q. 220. Will you swear positive you got the bill of sale in the fall of '76 from Ireton?

A. I swear positive I wrote out the bill of sale.

Q. 221. Do you swear positive that Ireton signed it at any time in the fall of '76?

A. No; I will not be positive of that, but I know we had the arrangements distinctly made, and I think, to the best of my
496 opinion, he did sign it. My partners in the Clara No. 2 at the time were James Harrington, Mike Gibbons, Mattie Moore, and Billy Gunn. I said nothing to them about having bought the Bobtail until along the next spring, or of any arrangement with Ireton; that is, I am not sure whether I did or not, but I told them in the spring about it—before the Murphy deed. I told Moore & Gunn, but did not tell Gibbons nor Harrington. I also informed them after I got the deed from Murphy, and after they went to work on the Clara No. 2 shaft. I bought the Bobtail title for the purpose of making money out of it, and I proposed to Gunn and Moore to let them in, and also Gibbons, if they paid their proportion, but did not do so prior to March 20th, '77. I told Manning about my owning the Bobtail title at the time that we entered into this contract to run the Bobtail tunnel in the fall of '77. We bounded the Clara No. 2 to Mr. Baley in Feb., '77. He knew about the Bobtail title, and asked me about it after he came back from Denver, and I told him that I owned

497 it. I never said a word to Baley about the Bobtail title at the time he bounded. Judge Murphy's office at the time he drew this deed from Ireton to me was in the recorder's office at Gayville. I don't know where his new office was. It was drawn up on Sunday, the 4th of March, I think. The two subscribing witnesses were present, Judge Murphy, Ireton, and myself, and at that time I give him a promissory note for $150.00, payable the 1st of October following. We informed Murphy of the previous arrangement that Ireton and I had for the purchase of the Bobtail, and that was the reason that it was dated back to the 5th of December. The consideration named in the deed was $1,500.00 I believe, while the real consideration was $150.00.

498 Q. 343. Do you remember that after you bought or got that deed, rather, about going to Gunn and Moore and telling them that you had bought and agreed to pay $1,500.00 for that Bobtail title, and wanted to charge their relative shares—one-fifth of that $1,500—to let them into the Bobtail?

A. I might have.

Q. 344. Did you do it?

A. I expect I might; I ain't here for my health.

Q. 345. You did not tell them exactly the truth then?

A. I told them I wanted that money for it.

Q. 346. Did not you tell them you agreed to pay that much for it to Ireton?

A. I don't know as I told them I agreed to pay that much; I did not tell them distinctly the arrangement.

Q. 347. Why did you not tell them distinctly the arrangement?

A. That was my business.

Q. 348. Did you buy this Bobtail for the purpose of blackmailing your partners in the Clara No. 2?

A. I always wanted to let them in; they agreed to go in with me.

Q. 349. For what?

[A.] The first agreement was going in on the Bobtail they agreed to pay me and Moore and Gunn. I and John Noonan came
499 down to town. I told them I would give them $\frac{2}{5}$ of what was inside the Clara stakes of the Bobtail.

Q. 350. That was away long afterwards?

A. I am telling when it was.

Q. 351. That was some time in April?

A. I don't exactly know; it went from day to day a good while after.

Q. 352. When did you go to work with Gibbons, Mattie Moore, and Gunn on the Clara No. 2, in the spring of 77?

A. Gibbons did not go to work.

Q. 353. Did you go with Moore & Gunn?

500 A. Yes, sir; I went to work on the Clara No. 2 shaft with Gunn & Moore about the 20th of March, 1877. I have no recollection of Tom Carey coming by there after that date, or at any time, telling me about the Bobtail, and advising me to pick it up. He knew I owned it long before that, and we had several talks about it.

I say again that I was working on the Bobtail discovery in Feb.

& March, 1877, and that two men worked with me a part of the time. The name of one is Kirkpatrick. I don't know where either of these men are now. This work was done north of the Clara No. 2 shaft, and I did not work in the Clara No. 2 shaft until the 20th of March or thereabouts, and I did not work on the Queen of the Hills for the purpose of representing the Bobtail.

I know where there is a toll-road running from Lead City to
501 the mouth of Golden Run. It was built in September, '76. He took about 3 weeks to finish it. I was interested in it. I did not work on that road in the spring of '77 until after the 10th of April. There was no work to do on it because there were no teams going from the mouth of Gold Run to Lead City or from Deadwood to speak of, and we had leased the road to Capt. Ward, who kept it in repair. C. F. Thompson was interested in the road with me, and I don't know that I did anything on it except walk over the road that winter. There were but two trains went over it—Mr. Gwin's and Mr. Sachett's. I heard a portion of Mr. Hanley's testimony; not all of it. I will not be positive whether I took the Bobtail relocation to the mining recorder's office the same day that I made the relocation or not, but it was within a day or so. I think I was the first that heard of this telegram about the necessity of rerecording claims that Mr. Chase received outside of him and Scotty Jenks. It was some time during the afternoon of the 14th of March, and I went up and had the Bobtail rerecorded after that or the next day.
502 I did not mention Bobtail when I spoke to Gibbons about this Chase telegram, as he was not interested in that claim. John Dawson never came to Gold Run to tell me the news about the ratification of the Indian treaty, as I knew it before he did, and I was not in Gold Run that night; I was in Gayville. I think Judge Murphy, Tommy Carr, Tom Henley, and Tom Bentley, the deputy mining recorder, was there when I left the Bobtail notice for record. There were plenty of others there, but I don't know their names. I was there the night of the 14th, and whether I had this relocation notice made out and filed for record that night or the next day I am not certain, but I am positive I had it done either on the 14th or the 15th of March. I put up the notice at the Bobtail discovery before the 20th; I got the copy for posting a day or so after I had it filed, and I posted it myself about 25 feet east of the trail on a hewed stake stuck in the ground deep enough to hold it up. I do not think that I had any box there. This notice did not remain up there very long. I am unable to state whether it was there
503 when we were working on the Clara No. 2. I took Jack McMasters there one day while it was posted, and he saw it and read it. I do not know that I said anything to my partners in the Clara No. 2, or my partners in the Queen of the Hills, about posting this relocation notice of the Bobtail. Some of them were trying to beat me. When we went to work on the Clara No. 2 in the latter part of March I worked considerably there off and on, and windlassed a good deal. Gibbons was sick at the time that Canty was killed. He was killed on the 10th of February, '77, and I took care of Gibbons in January and the fore part of Feb. He got up and

went to the funeral of Canty. For 3 or 4 day in the latter part of Jan. Gibbons was real sick. I did not stay with him all the time that he was sick. I saw the burned paper that was introduced here in evidence the other day by Mr. McLaughlin, and I first saw that paper when I got it from Jimmy Carr about the 10th of May, 1877, at which time I had it re-
504 corded in the county records. I told the deputy mining recorder, James B. Carr, to give me a copy of the Bobtail location certificate. I got this copy from him. I am not positive whether I ever saw the record of the March location of the Bobtail on the Whitewood quartz mining district records, but think I did. Tom Carr and I did not examine the records together at the time that I got this copy. I will swear to that. I also swear that this burnt paper is the copy that his deputy gave me. I saw him while he was writing it down from the records. I am almost positive that I saw the record and read some of it at that time, but I don't know in what book it was in. I am also pretty positive that I saw the supplementary record with my name. There was no talk at the time between Jimmy Carr & myself; I just ordered a copy of the Bobtail notice, the Queen of the Hills, and three or four other locations, and I took them all down to the register of deeds' office. I was not present while he was writing all of them. I don't know that I read all of this paper that is burnt. I was not acquainted much with
505 Jimmy Carr at that time, but I think it was from him that I got the paper. He signed my name to that paper, I think, and I never got but the one copy that I know of. I am positive now that I did see the Bobtail relocation notice with the supplementary notice on the mining records at Gayville. I think I filled up the Bobtail discovery shaft when I was at work on Clara No. 2. No one helped me that I remember of. This south centre end stake or tree of the Bobtail was cut off two or three times. I understood Jim Anderson cut it off once 8 or 10 feet high, which he could do by going on the upper side of the hill; he was quite a tall man. Gibbons and I never cut that tree down or put any part of it in the Clara dump. I understand that it was once cut lower down since Anderson cut it. I think when I saw it in July or August, '76, it was 6 or 8 feet high at least. I am positive I never cut down or put it into the Clara No. 2 dump. I knew Noonan in Iowa; he was there in '76; then went out and returned again in May, '77. I have considered him as a partner of mine for the last 16 years.
506 I was there the first morning of the Kello survey. Moore & Gunn done the talking with him. I did not say who the original locators of the Bobtail was to Mr. Kello, but I told him that John Noonan was the present owner of it. He became the owner before he applied for the patent by my making him a deed, and I turned over the title to him. This was before Kello made the survey, and that deed was placed on the county records. Moore and Gunn and I talked about it long before. I thought there would be less likelyhood of his application being endorsed than mine would be. I never made him but one deed that I remember of, and that was before the official worry. I don't know of any relocation of the

Bobtail in the name of John Noonan in 1878. I don't recollect about Kello giving me any certificate of relocation; if he did I don't recollect what I did with them. I paid him for attending to our business and I expect I did as he directed me to. I recorded whatever papers he told me, but I have no recollection about
507 this Noonan relocation. John Manning bounded the Clara No. 2 in the winter of '78 to Mr. Farrish, and I refused to sign the papers unless they took the Bobtail. Then it was that Billy Gunn and Mattie Moore refused the deed of an interest in the Bobtail and exacted the money for my proportion of the work on the Bobtail tunnel. By doing this they considered they would get their money for the Clara and pay out none for the Bobtail. I had paid for the surveys that Kello made. I don't remember just how much of a balance was due them, but I gave them an order on John Manning for the amount and it was paid. I pointed out where the Bobtail discovery was covered up. The shaft was cleaned out on the 16th of July of the present year; I went to the bottom of it. You were there then (addressing Mr. Clagget). I did not send a man there on the night of the 17th of July to dig it deeper; but as a lot of loose dirt had fallen in there afterwards I told Noonan to send a man to scrape out the loose dirt, and not move anything that was solid.
508 The representation work that I did on the Bobtail in 1878 & 1879 was all done right close by the Bobtail discovery shaft and consisted of grading off the side of the hill. I spent the $20,000.00 since the 10th of December last, and up to that time I had not done a great deal more than the representation work on the Bobtail. There was more than the representation work done outside of this Bobtail tunnel on the Bobtail ground and within the disputed ground in this case. I have done no work and tried to do none on that portion of the Bobtail within the Caledonia lines. Ireton told me when I bought him out that he had bought Carey's interest. I do not remember whether he gave me the bill of sale from Carey to him. He represented to me that he owned all the Bobtail except the Chizum interest and that he had a power of attorney to dispose of that.

509 THOMAS F. MAHAN was next recalled on the part of defendant and testified as follows:

I wish to correct my testimony — yesterday in relation to my statement that all the work that I had done in '77 was at the Bobtail discovery shaft. I had two men to work for me in the fall of '77 or the spring of '78 running a tunnel right east of the Caledonia discovery shaft. One was a man named Quinn, and the other was Jerry Cariso. I paid them each for 13 days' work and took their receipts for the same.

On recross-examination the witness further testified as follows:

This tunnel was east of and outside of the Caledonia lines, but inside the lines of the Bobtail. I put those men at work there to represent the Bobtail and it was run for the Bobtail vein. I expect the Queen of the Hills is running there. The work, I think, was done

some time in the winter, but I did not pay until some time in
510 the spring of '77. Jerry Cariso kept their time, handed in their amounts, and I paid them. I know Bob Cooper did not keep the amount and I know that tunnel was not started for the Queen of the Hills. I had no conversation with Cooper about it, but when Cariso was working on the road and when he worked in the Queen of the Hills shaft Cooper then kept the accounts, and it was a separate thing, and it was after he run this tunnel for me on the Bobtail that he worked on the Queen of the Hills. I ordered the work stopped on that tunnel myself when I thought I had work enough done to represent the ground. I know I did work enough in Feb. and March, '77, to represent it. I had done at least $100.00 worth of work at the discovery shaft. At the time that Ireton executed the deed no other document was drawn up, except a promissory note for $150, payable to Ireton in October following, or sooner in case I sold the Bobtail, and I have paid him the amount. There was no contract given Ireton at that time, except this note.

511 C. F. THOMPSON was then called as a witness on the part of defendant and testified as follows:

In the winter of '76 & '77 I was living at Lead City and engaged in merchandizing and mining. I had a man in my employ that winter named Andrew Kirkpatrick, and I know he worked awhile for Thomas F. Mahan, but whether on the Bobtail claim or not I cannot say. I know generally, but not specifically, where the Bobtail location is. I never took any pains to examine it. I know now where the discovery shaft was claimed to be in the winter of '76 & '77, but never made any examination of it; it was up near the head of Shoemaker gulch and below the Claras. There are two Claras there—No. 1 & No. 2. Where the Bobtail discovery shaft is claimed to have been has been pointed out to me below the Clara No. 2 shaft. I passed up the trail that runs by them from Deadwood the last of Feb. or the first day of March in company with John Burroughs, and we saw Thos. F. Mahan and some men at work there at, as I remember, Clara No. 2. There were two or three parties at
512 work there, and I distinctly recollect seeing Mahan at work there and talking with him at that time. My recollection is that there were men down in the shaft, and that he was hoisting ore on the dump himself. I don't know whether he was hoisting ore; I know he was on the dump and he showed us what he was getting out there. We sat down there on the dump and talked for 20 minutes or half an hour. I do not know who were at work in the shaft, as I did not see them, but think there were men working in it. I do not remember that I saw any one else at work at that time at the Caledonia discovery shaft. The trail passed within about 20 feet of it. If there had been I should be very likely not to remember it.

On cross-examination the witness further testified as follows:

Kirkpatrick was living with me in Lead City at the time he went to work for Mahan, and the arrangements were made in my place

of business. This was in the winter of '76 & '77, and was either in January or February, but I cannot say which month. I understood from what was said that the work was to be mining, but I do
513 not know where it was to be carried on. I have no recollection that Mahan said the work was to be done on Clara No. 2. I have a recollection that it was work over on the hill, but what it was I don't know. I don't remember of Mahan saying — about the Clara No. 2 or the Bobtail. I first heard the Bobtail spoken of in the winter of '76; heard of it again in the spring of '77 from Mahan and others, more particularly from him, both before and after the month of March. He was a neighbor of mine and frequently in my place, and frequently talked about his business matters. I saw Mahan there at the Clara No. 2 workings. I did not see any notice there, nor was my attention called to any. I fixed the date of that visit there *for* several matters. I remember very distinctly the occasion on which I happened there. It was after the killing of John Canty, and I had been down to Deadwood with John Burroughs. Canty was killed about the middle of February, and this was from one to two weeks afterwards. I have some memoranda by which I think I can fix the date of that visit. I was on that trail several times afterwards, and saw Mahan there at the Clara No. 2; do not know Billy Gunn. I know Mattie Moore and Mike Gibbons, but am unable to recollect whether either of them was there
514 with Mahan or not. I have seen Moore there, but whether on that occasion or not I am unable to say. There were men there that day—two besides Mr. Mahan. I do not recollect seeing Moore there with Mahan at any of the times that I saw Mahan at work there in the spring of '77. I recollect Mahan, because I was better acquainted with him. I have seen Moore on the ground, but when I cannot state. I cannot say whether I saw Gunn or Gibbons there with him.

515 JOHN BURROUGHS was then called as a witness on the part of defendant and testified as follows:

I was living in Lead City in '76 & '77—until May, '77. I believe I know where the Bobtail claim is; it is northeast of the Clara on the Clara Hill, and I believe I know where the Discovery is; I saw Mr. Mahan at it one day; this was in the latter part of Feb., 1877; I passed by there in company with C. F. Thompson; I came down here to Deadwood the last of February, and we went back to Lead City on the trail by way of Gayville and up Shoemaker gulch. The trail passed within 30 or 40 yards of the Caledonia discovery shaft right close to the dump; it also passed close to the discovery of the Bobtail, right close to it. We saw Mr. Mahan there on the dump and two other men at work; I think Mahan was drawing up a bucket or something of that kind. There was a dispute between the American Flag owners and the Palmetto owners, and we came over that way thinking that Mr. Thompson would have some influence with the American Flag owners to arrange the matter
516 between them and us; it was a pleasant day, and we stayed there talking some 15 or 20 minutes, perhaps more; we sat

down on the dump; I do not remember whether any one was at work at the Caledonia or not. I fix the date as very near the first of March. We had a snow-storm shortly after, in March, and I fix the last of Feb. or first of March because the weather was very pleasant during the last of Feb. If any one had been at work above ground at the Caledonia that day we could have seen them; don't remember whether we did or not.

On cross-examination the witness further testified as follows:

I know of such a claim as Clara No. 2, but do not remember when I first got acquainted with it. Mahan was at work at what I supposed was the Bobtail. I enquired of him about the different locations there and he pointed them out. I don't know as I am acquainted with Mathew Moore or William Gunn; I know
517 Michael Gibbons; I also know Andrew Kirkpatrick; I don't know that I ever saw Michael Gibbons at work at the Clara No. 2 shaft, and I do not remember whether Kirkpatrick was there; there were two men besides Mahan. I cannot place Gunn and Moore; Mahan pointed out the locations to me at that time, and outside of this locality where he was at work I know nothing about the Bobtail—that is, I don't know the lines, nor where they were in '76. Mahan pointed out to me the Clara No. 1, the Caledonia, and told me that was the Bobtail. I don't remember his pointing out Clara No. 2, Queen of the Hills, or Oro Fino. It was on the Bobtail, where I believe he was digging—where the shaft was. I don't remember any cut about 20 feet north of the Clara No. 2 shaft, or north of where he was working. We knew he was a friend of some of the American Flag parties, and we thought he could do something towards a compromise, and we talked about the American Flag. (Here witness Gunn was requested by plaintiff's counsel to stand up.) I know his face, but do not know that he was there at that time.

518 WILLIAM L. SACHETT was then called as a witness on the part of defendant and testified as follows:

I reside at Lead City, and am engaged in mining; came to the Black Hills, and got in here the 29th day of January, 1877, and commenced the erection of a quartz mill at Lead City. I know Thos. F. Mahan and the location of the Bobtail and Clara mining claims. I passed by the Bobtail several times that spring. The first occasion was on the 25th day of Feb. 1877. I was in company with William Howard and Walter Stone; we followed the trail. Mr. Mahan was there at work; no one else was there on the dump; this was on Sunday. I think there were men working below—down in the shaft—and he was in the right-hand side of the trail as we were going northward; the trail ran right onto the dump where he was working; made a bend and turned down the hill. We remained there talking with him 15 or 20 minutes. Howard was piloting Stone and myself over to Pinney's mill, and that was our first trip after we came into the hills. Having just brought a quartz
519 mill in here, we were looking for ore, and Mahan had quite a

little pile of ore on the dump—two or three tons—that had been selected and been piled up.

The reason I fixed that date with so much certainty is that we had finished shingling our house on the 3d Sunday after we had arrived here, which was the 18th day of Feb., 1877, and on the next Sunday following we went over to Penney's mill and passed by the Bobtail.

On cross-examination the witness further testified:

The first week after we got here Mr. Lloyd was engaged in getting the logs, and we commenced to build the house the second week after we were here. I fix the time that we finished shingling the house by reference to our time-book, which is at Lead City, and was first spoken to in relation to my recollection of this matter 4 or 5 days ago by Mr. Mahan in Lead City. He asked me if I remembered my coming there at that time. I think we could hear the men at work in the shaft. There was a windlass there over the
520 top of the shaft. I did not see any bucket; the rope was down in the shaft. I did not look down the shaft. I was over this same trail and by this same spot about two weeks afterwards in company with Hamilton Utley, and Mr. Mahan was there, and he seemed to be tending to the business at the top of the shaft. I passed by there afterwards twice in the month of March; went by on Saturday and returned on Monday, and he was there at work on both occasions. I cannot give the dates. I went over to Primey's mill to see him clean up on Saturday and Sunday, and returned back on Monday. Our engine and boiler came in on the 8th of April, and these visits were prior to that time. When I went there with Mr. Utley we went over there for the purpose of looking at the ore, and only went as far as where Mahan was at work. The first time I knew Mahan was the Sunday that I speak of, and the next time I saw him was about two weeks afterwards. I did not know his name for about a year afterwards, but I remembered his countenance. The Sunday that I was there first was a pleasant day.
521 We had good weather all through the month of February. There might have been a little snow, but not enough to amount to much. There was a big snow-storm in April that stopped our mill. Teams could not get around to haul ore. It was after the 1st of April. I remember two or three big heavy falls of snow that spring, but this one in April stopped up the work. The trail was broken, and in some places the hillside was bare — we first went over. There were some places where the snow had drifted in the ravines, where it was deep, and from the Bobtail work down Shoemaker gulch to the mouth the snow was pretty deep. Primey's mill was running on the 25th of Feb., when we went over there.

522 TERRITORY OF DAKOTA, *County of Lawrence:*

In the District Court, First Judicial District.

CALEDONIA GOLD MINING CO.
vs.
JOHN NOONAN. } N-. 121.

Bill of Exceptions.

Filed December 3d, 1881.

FRANK J. WASHABAUGH, *Clerk.*

Filed this 27th day of July, A. D. 1882.

B. S. WILLIAMS, *Clerk.*

Defendant's Case.

523 WALTER L. STONE was then called as a witness on the part defendant and testified as follows:

I came to the Black Hills in October, '76, and I am a member of the Racine Mill Company. I know Mr. Mahan. Mr. Sackett & party arrived here on the 19th of January, 1877. I have heard Mr. Sackett's testimony, and I was with him on Sunday, the 25th of Feb'r., '77, when he made the trip he speaks of to Princey's Mill and passed by the Bobtail work. It was on the last Sunday in that month, and William K. Howard was along with us. On Sunday, the 18th day of Feb., I was engaged all day shingling our house, and we made this trip on the Sunday following. We saw Mr. Mahan at the Bobtail works on that day. The trail ran within 15 to 20 ft. of the shaft, then turned off almost at a right angle for a little distance, then went down Shoemaker gulch. I have been over that ground frequently since that time. Now there is a wagon road made there where the trail use- to run. Mahan was then on the dump, as I suppose, tending the windlass. I did not know him before that.

524 On cross-examination the witness further testified as follows:

I think it was between 11 & 12 o'clock in the day when we passed by, and we staid there from 20 minutes to a half an hour. There was no snow on the dump. It had been cleared off, and the ore that had been taken out could be seen there. We examined the ore.

525 WILLIAM M. K. HOWARD was then called as a witness on the part of defendant and testified as follows:

I know Mr. Sackett & Mr. Stone, and just heard their testimony. I was with those men when they visited the Bobtail work and went up there with them. I have no particular recollection as to the date of the visit, but it was about the last of Feb. or first of March, '77. I knew Mahan before that and saw him there on that occa-

sion. He seemed to be working there at the shaft on the right-hand side of the trail coming from Lead City, on the up-hill side.

Cross-examination waived.

526 HAMILTON UTLEY was then called as a witness on the part of the defendant and testified as follows:

I was a member of the Racine Mining Company in '77; came to the Black Hills with W. L. Sackett, and reached here Jan. 29th, 1877, and have lived here ever since. I know Thos. F. Mahan. I have heard Mr. Sackett'- testimony in this case about our trip over to the Bobtail mine in March, '77; I made that trip with him; it was along in the fore part of March, but I am unable to fix the date. Ours was a custom mill, and we were looking around the various mines to find a supply of ore. There was a great deal of excitement about the Clara mine, and Sackett & myself went up there. We went over from there to where we found Mr. Mahan standing on the right of the trail at an open cut—a small open cut at the right-hand side and close to the trail where it turns and goes down Shoemaker gulch to Bobtail. I have since heard the place called the Bobtail & Clara No. 2, and have been there often since. That is the same spot where
527 Mr. Sackett & I visited and found Mr. Mahan. The trail is no longer there, but a wagon road has been built in place of the old trail. Mr. Mahan was standing there when we came up. I do not remember whether there was any work going on there at that time or not.

Cross-examination waived.

528 ED. TOWERS was then called as a witness on the part of the defendant and testified as follows:

Am engaged in mining at present and reside in Deadwood, and in '76 & '7 lived at Lead City most of the time. In the month of February, '77, was living at no one place, but was prospecting mostly from the middle of Feb. down. I know where the Bobtail claim is situated. It is on the divide, over the divide going from Lead City to Bobtail gulch, and I became acquainted with it first in the fall of '76. I passed by the Bobtail the last of Feb., '77. I had just come into town here and left my horse; then went to Lead City and stopped with Jimmy Coffin, the recorder, a day or two, and crossed two or three different times on the trail to Gayville about that time. The trail run below the Bobtail shaft a little. When I went over from here on the last day of Feb. to Lead City Mr. Mahan was to work there, and one day after I overtook him, or he overtook me, and traveled with me part of the way from Lead City to his work.
I saw no one at work there either time but Mahan. I was
529 not close to the shaft. I do not say positively that this was on the 28th of Feb., but it was about that date; might be the 27th of Feb. or 1st of March. I know that I arrived here on the 25 of Feb. from Rapid City. Then I staid one day at Montana, below Deadwood a few miles; then I came back the next day, and I stopped one night at the Custer House here in Deadwood, and one night at the I.

X. L., and then I went to Lead [City]. I know that afterwards I was 3 days going from Deadwood to Custer City, and I arrived there on the 8th of March, and I saw Mahan working on the Bobtail 3 or 4 days before I started for Custer. The two occasions that I saw him at work on the Bobtail was not more than one day apart; it might have been two days in succession, but it is possible that there was a day intervening. I am certain that I reached Custer on the 8th of March, '77, and I occupied 3 days in going there. From the time of my arrival from Rapid until I left for Custer I was here in this section of country six days at least. I understood from Mahan that he was working there, and when he came over with me
530 part of the way from Lead City it was to go to work there, below the Clara shaft.

On cross-examination the witness further testified as follows:

I know where the Clara No. 2 shaft is. It is pretty near the same locality. I knew this shaft in the fall of 1876. Mahan was working near it. It was just over the divide on the north side. I had heard that it was the Clara No. 2 shaft, but know nothing about it positively myself.

531 PATRICK BOYLE was then called as a witness on the part of the defendant and testified as follows:

I am engaged in mining and live at Lead City; came here the latter part of July or early part of August, '76, and know Thos. F. Mahan. I know where the Bobtail claim is, on the north side of the divide, and I saw him at work there in the latter part of Feb. or the 1st day of March, as I passed over the trail. He was working on what I have since learned to be the Bobtail lode. No person was working with him at that time. I think he was alone. No one was with me. I fix the time by the date of having a deed recorded two weeks afterwards, and at the time of the news here of the ratification of the Indian treaty.

On cross-examination the witness further testified as follows:

I know where the Clara No. 2 is. It is on the north side of the divide facing from Lead — to Gayville, and is a little south of the place where I saw Mahan working.

532 On re-examination the witness further testified as follows:

I know where the Caledonia discovery shaft is, and passed by it on that trip. Nobody was working there then.

533 THOMAS E. CAREY was then recalled on the part of defendant and testified as follows:

In the latter part of Feb., '77, I was living at my cabin on claim No. 3, on the north fork of Gold Run, and on the 27th day of [that] month I loaned Thos. F. Mahan a wheelbarrow to work upon the Bobtail lode, and he retained there about a month. I saw him working with it at the same place where I helped to make the Bob-

tail location. I fix the date that I loaned him the wheelbarrow as the same that I took possession of cabin No. 3. I took possession of the premises on that date and I loaned him the wheelbarrow the same evening, and he kept it 4 or 5 weeks before it was returned. I only saw him at work there once; that was the day he brought the wheelbarrow home. I recall the circumstance that I had paid out money to several parties and took their receipts to settle a controversy upon that ground—claim No. 3. Those receipts bore date Feb. 27th, 1877.

On cross-examination the witness further testified as follows:

I have got those receipts now, and I lived in that cabin nearly all the time from the 27th of Feb. until the wheelbarrow was
534 brought back. I frequently came to Deadwood during that time, but don't think I went to Gayville but once. I know the claim called Clara No. 2; became acquainted with it in the fall of '76. Know where the Clara No. 2 shaft is. It was not known as the Bobtail, and it was not at that shaft that Mahan was using the wheelbarrow when I saw him at work there the time I went to Gayville. Mahan was at work 25 or 30 feet northerly from the Clara No. 2 shaft, and he had two men at work in the Bobtail shaft as I took it to be. I should say it was 15 feet deep—from 10 to 15 ft. That shaft is not there yet. I think it has been filled up—covered up—the shaft and open cut where they were at work. It was north of the Clara dump. To the best of my recollection, the Bobtail shaft, where Mahan was at work, was about 6 feet square. I did not pay much attention to it at the time. I did not look down enough to see the men. I should it was 15 feet deep, might not have been quite so deep as that, but it was from 10 to 15 feet, I should think.

535 JOHN GODDARD was then called as a witness on the part of defendant and testified as follows:

In the winter of '76 and '7 I was living part of the time at Gayville and part of the time in the spring at Lead City. I was engaged in mining and prospecting. I had occasion to cross over the trail from Gayville to Lead City several times, back & forth, during the winter. About the last of Feb. my partner and I started from Lead to go to Deadwood, and we came back the next day. I knew Mr. Mahan at the time, and I knew where the Bobtail claim and the Bobtail discovery were; Mr. Mahan was at work there that day. I didn't notice anybody else at work there; he seemed to be waiting on somebody that was below—at least, I suppose that is what he was doing. I passed along and don't remember having any conversation with him. Our purpose in going to Deadwood on that day was to have a claim away down on Gold Run gulch recorded.

We had this claim recorded on the 2d day of March, 1877,
536 and this trip was a couple of days before that. I again passed by the Bobtail about 3 weeks after this trip; I saw no one there, but I saw a notice written on paper and stuck on to a square stake which was stuck in the ground there, near by where I saw Mahan at work. It was a notice of the Bobtail claim. I did not

read it all. It was a new notice and was tacked to the stake. At the time that we passed along the trail, the last of Feb., we passed a little below the Caledonia shaft. I saw no one at work there then; if there had been any one at work on the surface at that time, we were close enough to have seen them.

On cross-examination the witness further testified as follows:

I cannot say whether there was any one in the shaft, but I thought Mahan was waiting on some one below. I suppose there was somebody in the hole. I know what is called the Clara No. 2 shaft; it was not there where Mahan was standing. There has been a great deal of work done there since, and I cannot tell whether it is the same
537 place or not. The next time that I passed by there and that I saw the Bobtail notice my partner, Geo. Stock, was along. I don't remember whether we were going to or from Gayville when we noticed it. We moved away from Lead City, where we were camped, about that time, and this was about 3 weeks after we first saw Mahan at work there—the last of February. I think the Bobtail discovery shaft is closed up; the stake on which the notice was is not there now. I don't remember that I noticed any Clara No. 2 stake or notice. The Bobtail stake & notice was on the right-hand side going from Gayville to lead—maybe 40 or 50 feet I have no very distinction of that notice except that I looked at it and read a part of it. I did not read it all; I read enough to know it was a Bobtail notice; read the top part.

538 W. W. MONTGOMERY was then called as a witness on the part of the defendant and testified as follows:

I live at Terraville, and am engaged in mining, and have been in the Black Hills since the fall of '76. I know that there was such a claim as the Bobtail, but I didn't have much acquaintance with it. It is located about the head of Shoemaker gulch. I went across there several times during the winter and spring. The first time was in Dec., '76, and I crossed there about every month in the winter. I commenced work for Baley & Durbin making a road, so that they could get in their boiler for a little mill on the Golden Terra on the 4th of Feb'y, and worked about a week. I know where the trail ran up Shoemaker gulch and over the divide, and where it passed a dump on the north side of the summit, and I crossed back & forth there every few days during Dec. & Jan. I had just come into the Hills before that, and was living with my brother at
539 Lead City. Some of the boys who had come into the Hills with me were living at Gayville, and I was in the habit of going over every few days to see them. I was not working there at all. About the 9th of March I moved over from Lead City to Central and began to work for the Hidden Treasure Company, and I earned $55.00 during the balance of the month at $4 a day. I did not work every day during the remainder of the month. About the 9th of March, before moving over, I met Mr. Mahan in Gayville, and he went over with me from there, and when we reached the dump on

the trail he told me that that was the Bobtail, and that he would go to work there the next day. I cannot tell whether I saw any fresh work there or not. He went on over to Lead City with me.

On cross-examination the witness further testified:

I think it was the 24th of Feb. I went to work for Bailey & Durbin, and it was after that that Mahan showed me the dump.
540 About the 9th of March, 1877, I worked 5 or 6 days for Bailey & Durbin. It might have been 9 or 10 days after I quit working for Bailey & Durbin that Mahan pointed out the Bobtail to me. I got the idea from what he said that he was going to commence work on the following day.

541 THOMAS BURNS was then called as a witness on the part of the defendant and testified as follows:

In the winter of '76 & '7 I was engaged in merchandising here in Deadwood. I know Thos. F. Mahan, and on the evening of the 23d of Feb., 1877, I sold him a keg of powder, some fuse, a pick, and I think a hammer. He bought these articles for mining purposes, and I only know where from what he told me. I fix the date from examining my books.

On cross-examination the witness further testified as follows:

The size of the keg was 25 pounds, and contained ordinary blasting powder. I fix the date by an examination of my books containing an entry of the sale. He never bought a keg of powder from me at any other time, nor a box of candles. That is the only bill of goods that I ever sold the man. I will bring you down the books. There is no entry in my books of the sale by me of the articles to Mahan, but there are two entries that I made
542 on that date that I sold him the articles, and they are as follows

Feb. 23, '77.	Balance due Thompson	43 50
	Balance due on Frank	12 50

The transaction with Mahan was a cash sale, but I remember that on the day that I sold him the articles Mr. Mahan was about to have a difficulty with Ike Gray, the stage agent, and that impending difficulty was on the day that I made the above entries. Mr. Gilbert, of Central, was then in my store and knew of the sale of the goods. Mr. Thompson brought out a trunk for Mrs. Fay from Cheyenne, and had dropped it in the Cheyenne river and damaged her clothing, and there was considerable trouble that night in my store in settling about it, and I made the above entry in my books. I distinctly remember the transaction as all having occurred on the same day.

543 CHARLES MCLAVEY was then called as a witness on the part of defendant and testified as follows:

I reside at Lead City, and am engaged in mining at present on the Bobtail mine for Mr. Mahan. In the summer of '76 I was liv-

ing in Deadwood, and in the latter part of January, '77, I went up to Gayville & Lead City, and was then engaged in prospecting. I knew then where the Bobtail claim was situated, and knew in the spring of '77 where the Bobtail discovery shaft was. I first knew where it was the latter end of Feb. & the fore part of March of that year. The trail running up Shoemaker gulch ran right by it. I did not follow the trail, but went over the hill. I was there at the discovery of the Bobtail two or three times during the latter end of Feb. & the first of March. Once I went over to Lead City to see a man by the name of Robinson, and the other time I was prospecting over the hills. I saw Mr. Mahan there at work. He had a shovel in his hand. The next time I was there, 3 or 4 days
544 afterwards, he was there working. I think there was somebody down in the shaft at work. Mahan was on the top, and it looked as though he had been wheeling dirt there. There was a wheelbarrow there lying on its side. I was there again shortly after that big snow-storm in the month of March. I forget what time it was. I do not think there was more than 3 or 4 days between each of these visits. I do not know who was in the shaft. I staid but a short time; asked the name of some of the locators around there. I think I was there four times. I cannot fix the time more definite than that the third time it was shortly after the big snow-storm in March. I think Mr. Mahan was there at my fourth visit, where — was a discovery stake up then that I did not notice before. It was a hewed stake, and on it was a written notice. I did not stop to read it, and cannot say definitely now whether it was written on the wood or on paper.

545 On cross-examination the witness further testified as follows:

I have known Mahan ever since by sight, but never spoke to him to have any conversation until lately. I had no particular business there at that time, excepting that I was prospecting. I never knew Mahan before I met him there on the trail. I saw him once in Central and once in Deadwood in September, '77, and knew he was the man that I had seen working upon the Bobtail mine. I know that it was about the latter end of Feb. or the first of March, '77, that I saw him at work on the Bobtail mine, because it was just a little before the stampede to Nevada gulch. I was one of the stampeders. I knew that this claim was in litigation; that's all. I never heard from any one that the date, the last of Feb. or the first of March, was an important date in this case. Noonan asked me once if I was here in the country about that time, and I told him I was; that I had prospected over there then. I done my principal
546 prospecting over on Bold Mountain and over in False Bottom. I think it was about a week ago that Noonan asked me about this. He did not suggest that the latter part of Feb. or the first of March. I remembered that I was here and had been prospecting, and I told him that myself. He asked me if I had seen anybody there at work about that time, and I told him yes, that I had seen Mahan; that's about all that he said. The reason

I thought somebody was working in the shaft was I heard the noise of a hammer or the breaking of rock. I did not go close to the shaft. Mahan was on top and had a shovel and was leveling off the dirt. I know where the Clara No. 2 shaft is, and the shaft they were at work in was below it 25 or 30 feet, perhaps, lower down the trail and to the north. There was no windlass on the Bobtail shaft. I do not recollect seeing any windlass there. They generally mine 12 to 14 feet without a windlass.

547 J. C. MURPHY was then called as a witness on the part of defendant- and testified as follows:

I reside at Lead City and am engaged in prospecting and mining. In the spring of '76 I was living there and was engaged in cutting logs and getting out timber for the Racine Company mill and some for Bailey & Durbin. I know where the Bobtail mine is now situated; it is north of the divide from Lead City, and I know where the trail is running over to Gayville. I had occasion frequently to go over that trail during the spring of '77. I do not recollect the date of any of my trips; I went so often that I cannot call to mind any of them. I crossed there in Feb., in March, and in April, and I saw Thos. F. Mahan there, and there was other parties working down in the shaft. I think they had been at work there a long time; I judge this by the looks of the work that was done when I passed backwards & forwards there. I think they had been working there
548 through January & February; I think Mahan had been working there all through Feb., and also in March. Sometimes I would go by there as often as twice a week, and sometimes not oftener than once in two weeks. We use- to get our grub at Gayville and carry it across to Lead City. I worked myself on the Bobtail in the early part of '78; I worked two days along with Mr. Green for Thos. F. Mahan; I think it was in January, '78, but will not be positive. Thos. F. Mahan paid us for our work. The ground was frozen very hard and we did not make much progress; we had to build fires to thaw out the ground. The first day we went to work there some parties came along and told us we had better stop working there; I don't know who they were; they told us the best thing we could do was to quit work; they appeared to be mad; I did not know them then, nor have I known them since; so we quit work.

On cross-examination the witness further testified as follows:

549 I knew Mahan by sight for over a year. I never knew him anywhere else. I am prospecting—that is my business—and I have been working for the Homestake company now and again. I have been working for the past two days for that company. I went up there and asked for a job, and they gave it to me. I was advised by no one to go there and get work. I came down yesterday, and the evening before that I talked with Noonan. No one else was present but Green & myself when we were notified to quit work. There were either two or three men, and apparently they came from the direction of Lead City. I did not feel apprehensive and was not very badly scared, but was scared some. I saw no arms with them.

We staid probably a half an hour. I did not have much talk with them. Mr. Green did the talking in my presence. This took place at the Bobtail discovery, north of the Clara No. 2 shaft; it might be 50 feet or less, but not more.

550 JOHN GREEN was then called as a witness on the part of the defendant and testified as follows:

I came to the Hills in '75; am now working for the Homestake company, and live at Lead City. I learned where the Bobtail claim is in spring of '76 from a man named Ireton. It is south of the Caledonia, on the east side of Shoemaker gulch. In the winter of '76 & '7 I lived in Deadwood gulch, and moved up to Lead [City] in the fall of '77. I worked on the Bobtail for Mr. Mahan in Feb., '78; I worked off and on some 4 or 5 days. Some other parties worked with me; I cannot remember their names. The last time I worked a man named Murphy worked with me on the last day. Sometimes there was four or five men working with me. I think there were that number worked there the first day. I forget *now* many worked the second & third days, but there were more worked than myself. The last day I worked a man by the name of Moore came there and cussed and said I ought to know better than to work there,
551 and he ordered us off. He seemed to be of a fighting order, but we were not going to fight for other men's property. This was in '78, but I do not know the date. Murphy was there at the time. We did the work above the trail and on the left-hand side as you come up Shoemaker gulch. I passed by there in Feb., '77, on my way from Central to Lead, where we were going to put in a new recorder and draw lots for town lots in Lead City. This was the latter end of Feb., and I saw Mr. Mahan at work there on the Bobtail. I saw no one else there with him. He was doing some grading with a pick and shovel. I passed over that way again about the 20th of March, and Mahan had a shaft there 10 or 15 feet deep; was working in it. It was somewhere about the 20th of March. He then advised me if I had any ground that I had better relocate it and put up a new notice; that the old locations would not hold good, as there was a new law from Washington. He pointed to a new notice
552 which he said he had just put up of the Bobtail, but I did not read it; I saw a notice there. I cannot exactly describe where the notice was, but it was there somewhere about the shaft. The notice was written on paper [and] tacked on a board and the board nailed to a stake. He said he had just put up his notice. I did not see this notice there at the time I went over to draw lots.

On cross-examination the witness further testified as follows:

I had no business there except going to Lead City for the purpose stated, and I talked with Mr. Mahan as I came up to him maybe for ten minutes—not long, however. I did not observe any notice anywhere about there at that time; I paid little attention to the locality. The second time my attention was called by Mr. Mahan to the notice [was] when he remarked that he had put up his notice and that I had better have my ground relocated. I was prospect-

ing before I went to work for the Homestake company, and
553 I sought work of my own accord. They did not know that I was a witness in this case, nor do I know that Mahan knew that I was to be a witness. I do not know who has had charge of the Bobtail work since they started up last fall. It was the 4th or 5th day that we were at work that Moore came and ordered us off; there were two of them—Mr. Gunn and Mr. Moore—and there were two of us; we did not remain over ten minutes there after that; I said to them that I knew nothing about their difficulty, and would not have gone there if I knew about it, and he said I ought to have known better; his talk was unfriendly and he abused me; after I said to him that I didn't know anything about the difficulty he still abused me, but not so bad as before; I said nothing to him by way *in* reply; I didn't know anything about the difficulties; if I had I wouldn't have gone there; Gunn didn't say anything; I think Mr. Moore had weapons with him, but cannot swear positively to that, nor can I swear that he threatened to use
554 any. There was a shaft south of the Bobtail that I heard Dawson and some of the boys call Clara No. 2 in '77 & '78; I saw the shaft in the fall of '76, after I got back from the Big Horn country, with a windlass on it.

555 JAMES CHAPURA was then called as a witness on the part of defendant- and testified as follows:

I know where the Bobtail mine is, and passed by there several times and saw Mahan at work there. I passed by one time about the 27th of Feb. or 1st of March, going over to Gayville for some medicine for Bill Baldwin to Wood & Wilson's drug store. Mahan was at work there at that time on the top of thedump. When I got the medicine I went back the same way to Lead City and again saw him at the mine about ¾ of an hour afterwards. I use- to go over from Lead to Gayville once or twice a week, and the next time that I went by was in the early part of March, and he seemed to be at work there. There was somebody there with him on top of the dump, but I don't know who he was. There seemed to be some one at work in the shaft. I cannot tell how often I passed there in March. I was living with Coffin & Burroughs in Lead City, the same Burroughs that is now deputy register.

556 On cross-examination the witness further testified as follows:

My feelings are all right towards the Caledonia company; I have nothing against it; I never worked for it. I knew nothing about being a witness in this case until last Sunday. I first learned about it at the Father De Smet mill from a man named Dan Edwards. He asked me if I had traveled over that trail. I told him I had. I think that was about all the conversation. I have not talked with any of the parties down here. I have not told anybody down here that I knew anything about the matter nor about the date that I went over the trail. It is something I don't care to be, a witness in any kind of a case. Mr. McLaughlin asked me a few questions the

other evening. I have hunted up no memoranda about the date. I told Mr. McLaughlin what I went to Gayville for, and I have not been to Wood & Wilson's to see just when I got it. I remember Baldwin being very sick about that time and I was called
557 over there to go after medicine for him. He had the jim-jams and was tearing up the furniture and raising the devil generally. I was there and saw it; that's what fixes it in my memory. It was caused by drinking whiskey at Lead City. He is around town somewhere now, I believe.

558 JEREMIAH CARISO was then called as a witness on the part of the defendant- and testified as follows:

I am engaged in mining and live at Lead City. I know where the Bobtail claim is and have been working on it for the last five or six months. I was present at the time of the Kello survey of the Bobtail in the latter part of '77. He was engaged for two days and I was with him on the first day. Billie Gunn, Mattie Moore, and Thomas Mahan were there. I think John Noonan was there, to-. Mr. Carey was there, to-, on the first day. He went over in the morning to the claim, and Mahan, Carey, Kello, & myself went over to the northwest corner stake. When I went over there first I met Billy Gunn & Mattie Moore; after-while Mahan & Carey came along, and we all went over to this northwest corner stake, which was a dry tree broken off about 25 or 30 feet from the ground. I do not know its height exactly. There was an old notice marked on it with pencil pretty well worn out. I forget what the date was. I could not make it out; thought it was Dec. —. Mr. Carey
559 went first to the tree; then each of us went to look at the notice. I could make out that it read "northwest corner of the Bobtail, located in 1876." I could not make out the other date, but thought it was Dec. —. This was late in the fall. I never attended but one survey of Mr. Kello. Then we came to the stake 60 or 70 feet south of the discovery—a pine stump. I think it was pointed out by Mr. Carey. I did not see any other stake that day but these two, the northwest corner and the south end stake. In the summer of '77 I built a road through here (showing down the ravine) from the Queen of the Hills for Mahan and other gentlemen who were working on the Queen of the Hills shaft and taking out ore, and I found an old hewed stake about 3 feet long that was marked west centre stake of the Bobtail. It looked to be quite old. A man we called Joe was working with me building the road. I do not recollect the month, but it was when we were building the road from the Queen of the Hills down Shoemaker. (Here witness pointed out on the map about the place where he found this stake, which was on the west-side line
560 of the Bobtail as it appeared on the map and a short distance southwest of the Caledonia shaft. It looked like an old stake. I worked on the Bobtail in '77 and know where the tunnel is, west of the Bobtail discovery, and visited it at the time of the Kello surveys. Mahan and I went there together. Surveyor Kello, Matthew Moore, and Billy Gunn were there at the tunnel. They called it the Bobtail tunnel in their talk to the surveyor, and it was shown

to him by them as work done on the Bobtail claim. Billy Gunn & Mattie Moore had very much to say to the surveyor at that time about the Bobtail claim and the work on it, and I heard both of them say that that tunnel was Bobtail work. The tunnel was 75 or 80 feet in length and was west of the Bobtail discovery and down towards the gulch. I think now that February was the month written on the northwest corner stake instead of December, but I wouldn't be positive. I think it was Feb. and I think now that my recollection is refreshed; that I so testified in a deposition
561 made by me in this case some 18 months ago. The snow and water had worn off a good deal of the writing. The writing was on the southeast side facing the claim. I could read '76; that was plain. I do not now recollect if there were any names signed to it or not. The south end stake, I was informed by the parties there, was the southwest corner stake, I think. I helped chain off a line with Mr. Kello.

On cross-examination the witness further testified as follows:

We built this road a little before we made the survey. I never saw this stake before we built the road down from the shaft to Shoemaker gulch. No, it was after we made the survey that we built the road. I never worked on the Bobtail in the fall of '78, but there were some men working there. When I worked it was for Tommy Mahan and he paid me. This was in the fall of '79, and at that time I worked right above the Caledonia shaft. He told me he wanted some work done on the Bobtail, and I went over there
562 and started a tunnel about a hundred feet above the Caledonia shaft, and I worked there 8 or 10 days. Another man, whose name I forget, worked with me; I think it was Denny. Mahan took us over there that morning and showed us where to go to work and run a tunnel there on the Bobtail. After we were at work awhile Mr. Cooper and Mr. Delaney came to us and told us not to work there. Cooper did not work with us at that time. They told us not to run a tunnel there. They said that was Queen of the Hills ground and that they were owners in it.

On cross-examination the witness further testified as follows:

I know where the old Caledonia discovery shaft is. I found the old Bobtail stake about 100 feet north of it lying on the ground. I worked on the Bobtail for Thos. F. Mahan in the fall of '77. I cannot tell the place exactly, but it was about there. (Here witness pointed to a spot northeast of the Caledonia workings on the map.) We graded out a cut to start a tunnel, perhaps ten feet in length, and we ran a tunnel 15 or 20 feet long. Denny Guinn worked
563 there with me 12 or 14 days, and we each received $4.00 a day. I do not know how far this place is from the Caledonia discovery shaft, but think it is considerable over 100 feet. I did not testify heretofore that the Queen of the Hills people came down and ordered us off after we had done 10 or 12 days of work, but I testified that Mr. Cooper & Mr. Delaney came there and told us to quit; that we were on the Queen of the Hills ground.

564 R. H. KELLO was next called as a witness on the part of the defendant and testified as follows:

I am a deputy United States mineral surveyor for Dakota, and have followed the profession of a civil and mining engineer for 9 years. I was appointed deputy by the surveyor general of Dakota in Sept., '77. I know where the Bobtail lead is on the east side of Shoemaker gulch, a tributary of Bobtail gulch. I made a survey of the Bobtail about the last of December, '77. The field-notes of that survey were burned in the Deadwood fire last fall. I think there are some copies of it in existence. I furnished a copy for the surveyor general. I made that survey at the request of Mr. Moore and Mr. Gunn, and I also surveyed for them the Clara No. 2. At first they were not certain whether to have me survey the Bobtail, as Mr. Mahan had engaged McEntyre & Clapp to make the survey, but as I got on the ground first and had started on the Bobtail survey they all concluded that I should proceed with the survey. I found

565 waiting me on the Bobtail ground when I reached there Mahan & some others whose names I do not remember. Gunn & Moore accompanied me. My best recollection now is that Mr. Carey was on the ground, but at that time I did not know him. I was shown the discovery shaft of the Bobtail, the south centre end stake, and the northwest corner by, I think, this man Carey and other parties. I recollect that the main point shown me was the northwest corner, a large dead stub, about 18 inches in diameter, and all the parties on the ground accompanied me to that corner, and I wrote upon it northwest corner of the Bobtail mine; then went back to the discovery shaft and run at right angles to the centre line 150 feet to the west, south 89°, & some minutes west. I continued that centre line until I struck a point shown me as the south centre end stake, which was a stump. There was a mound close to the stump. There were no marks upon this stump. I wish also to state here that when I was at the northwest corner they showed me a stake which was marked either north centre end stake or northeast centre end stake—something of that kind—which was lying on the ground and a mound of rocks close by where it belonged.

566 I then got on the line of the northwest corner at the place, 150 feet westerly of the discovery, and projected that line until it intersected a line, drawn at right angles, that passed the south centre end stake so claimed of the Bobtail. I found nothing marking the southwest corner. I projected the line from the southwest corner by that stump up the hill, and established the southeast corner, and found nothing there. I saw several mounds of rock there, but nothing was pointed out to me as being the southeast corner. I then ran to the northeast corner, and found nothing there marking it as the northeast corner. Nothing was pointed out to me on either the east or west side lines as centre monuments. I ran the east line first; then I ran up to the stump south of the discovery, and ran this south line from the southwest corner. Then I ran the west line to the northwest corner, and turning 90° ran the

north line, and established the northwest corner and the north centre end stake. I marked the points that I supposed would be the centre of the claim, and established the east and west side centre stake. (Here witness was asked to examine the map of the
567 Bobtail mine, showing the conflict with the Caledonia claim.) That map correctly shows the Bobtail claim. The discovery of the Bobtail was a few feet north of Clara No. 2 shaft. I saw nothing there but an open cut. The bank had been cut down on a level with the road, and they claimed to me that the discovery shaft had been filled up. Mr. Gunn & Mr. Moore accompanied me around the survey, and one or two other men, whose names I do not recollect, assisted me. Mahan was with us a portion of the time. Mr. Cariso was here requested to stand up, so that the witness could see him. I cannot say whether that man accompanied me or not. There were several parties along, but I paid no attention to their faces or names. I caused the corners of the claim at that time to be well marked with stakes set up and supported by mounds of rock. The parties furnished the stakes; I marked them, and saw them put well in the ground. I don't know who it was set the stakes up. I think both Gunn & Moore pointed — out to me as work done on the Bobtail. The Bobtail tunnel, I think, it was about 70 or
568 80 feet in length. About all that they said was that it was the Bobtail tunnel. I certified to $500.00 worth of work done on the Bobtail at that time, on the basis of that tunnel and the open cut. I made an official survey of the Bobtail in the latter part of March or early part of April, '78, and at this time made the certificate of $500.00 improvements. An application for a patent was then made. Moore & Gunn were the only parties that employed me.

On cross-examination the witness further testified as follows:

When Moore & Gunn employed me they wanted Clara No. 2 and the Bobtail surveyed. I think they mentioned the Bobtail. Mr. McEntyre was not there when I reached the ground, but when we went to dinner we met an assistant of his coming up to make the survey of the Bobtail. I told him that he was late; that the other parties, Gunn & Moore, had employed me to survey the two claims; Mr. Mahan had employed McEntyre; to a great extent the plat and survey of the Bobtail was projected from that northwest
569 corner stake, but there were other objects—the discovery shaft and the south centre end stake. I did not pay much attention to the north centre end stake, for the reason, as you are aware, that the end lines must be parallel, and we often have to give or take, as the miners say, to accomplish that; they pointed out to me a stake on which the words north centre end stake of the Bobtail was written, and also a mound of rock; the stake was laying some 50 or 75 feet easterly of this mound of rock; we were looking for the stake before we found it, and when we were at the northwest corner they claimed that it was standing where the mound of rock was. I was but a few feet from the stake when it was found. I do not know who it was that said that that stake had stood in that mound of rock,

but it was one of the parties; it was an old dry stake—a usual miner's stake 4 or 5 inches square; there was no pitch over the writing, nor was there any pitch over the northwest corner stake; the writing was sufficiently legible so that one could read it very plainly. It is possible for a person to take fresh writing on an old stake and rub dry dirt over it and give it the appearance
570 of age, but this would rob off the fiber sticking out. You cannot always tell the age of writing on a stake. I think the top of the northwest corner tree had been blown off—the south centre stake had been cut down. When I first saw the northwest corner stake it had an old blaze on it a foot or 18 inches in length and several inches across. I don't know as you could tell that it was blazed at any distance, as it was a very old blaze and the bark was off the tree. You could not tell that there was a blaze there until you got to the tree, because it presented very much the same appearance that the rest of the trees did—the bark being all off. No southwest corner was pointed to me. I have been frequently upon the Bobtail ground since; never noticed particularly the changes. There is a road running up there now, and the level of the road is graded into the bank 50 or 75 feet, and on the upper side it is about 7 feet high; the cut then was about the same depth that it is now, but the discovery shaft they said was covered up. Above the Clara No. 2 shaft there is a big open cut. I am not able to say now whether Gunn or Moore
571 printed out any of these stakes. There were several parties who pointed them out. This man, who was one of the original locators, pointed out these stakes. The mound of rock where it was said the north end centre stake stood is about 25 feet in a southerly direction from the present north end line of the Bobtail. I don't recollect when it was that the parties said they had seen this stake standing in the mound of rock. I commenced the survey of the Bobtail first, and when we reached the Caledonia shaft I stopped. I was stopped by a few rifles and pistols that were pointed at me by the parties at the Caledonia mine. I don't know their names, but some of them came to where we were. I explained to them my official capacity, and that I could make the survey. We had considerable discussion with reference to the matter, and I agreed to postpone the survey until the next day, until they could come down here and consult some attorney as to what right I had to make a survey over that ground. I then started and made the Clara No. 2 survey, and completed it early next morning, when I finished
572 the Bobtail survey. The Caledonia people and Queen of the Hills people were the parties who opposed the Bobtail survey. I was running the west line of the Bobtail at the time that they stopped me. Noonan was present on one of these days. It is customary and the proper thing for the surveyor to ascertain the name of the lode, the date of the location, the name of the locators, the date of relocation or amended location, and the names of the relocators. I enquired who the locators of the Bobtail and the Clara No. 2 was, and they gave me the names of the original locators of the Clara No. 2. I think a portion of them were Mahan, Gibbons, Gunn, & Moore. I think Noonan was given as the locator of the

Bobtail. I could not tell who it was informed me. I drew up an amended location certificate for both claims in my office in Central. No one was present at the time who was interested in either claim. I gave both of the amended location certificates to Mr. Mahan. I think Mr. Mahan paid me for both those surveys, and it was only a few days after the surveys that I gave these certificates to Mahan.

573 I cannot give the language of the certificates, but they described surveys, and they had plats attached to each showing the conflict between the Bobtail and Clara No. 2 lodes, the only difference in the plat being that in the one representing the Bobtail the Bobtail claim was made to appear prominent, and in the Clara No. 2 that claim was made to appear prominent. I think I would recognize a copy of those certificates.

(Here witness was handed a paper for examination purporting to be an amended location certificate and plat of the Bobtail lead—John Noonan, locator.)

I think that is a correct copy of it. It is very hard for me to tell whether there had been any change made in the size of the excavation cut of the Bobtail between my preliminary survey the last of Dec., '77, and the official survey which I made the latter part of March following. I measured the size of the cut at the time of these surveys, but my measurements were destroyed in the fire.

On re-examination the witness further testified as follows:

574 At the time that I was interfered with and stopped by the Caledonia parties I told them I would send for an officer, and I did send for one, but am unable to state with certainty whether it was Mr. Moore or not. The mound of rock which was pointed out to me as the place where the old north centre end stake of the Bobtail stood was probably 20 or 30 feet—somewhere along there—south of my north centre end stake that I established. (Here witness pointed out on the map a point south, a few feet, of the point designated on the map by him as the north centre end stake, Bobtail.) I should judge it was 25 or 30 feet south of this point, and the stake was found lying up here somewhere, 50 to 75 feet away from the mound of rock in an easterly direction. I do not remember which one of the parties present it was that told me that that was the north centre end stake of the Bobtail.

575 Q. 18. What is your judgment now, with your experience as a surveyor in these hills, as to whether the writing on the northwest corner stake—that dead tree you speak of—and the writing on that stake shown as the north centre end stake was old writing or not?

A. That is impossible, to tell how old it is. You might take a stake that has been blazed off quite a long while and write on it, and you can take your finger and rub over it, and you can make it appear as if——

Q. 19. Did you see any evidence of anything of that kind?

A. That you cannot tell, not knowing it to be the case, for I have experimented on it [a] number of times. You take these fibres,

but it was one of the parties; it was an old dry stake—a usual miner's stake 4 or 5 inches square; there was no pitch over the writing, nor was there any pitch over the northwest corner stake; the writing was sufficiently legible so that one could read it very plainly. It is possible for a person to take fresh writing on an old stake and rub dry dirt over it and give it the appearance
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Q. 19. Did you see any evidence of anything of that kind?

A. That you cannot tell, not knowing it to be the case, for I have experimented on it [a] number of times. You take these fibres,

sometimes an eighth of an inch long, and write over them, and it is almost impossible to tell positively.

Q. 20. What was the appearance of the blaze which you found upon the tree, and also on the stake, as to being old or new?

A. It was quite an old blaze, sir.

Q. 21. Give the result *or* your judgment as to about how old.

A. You cannot. It is very hard to tell. There is no difference between the blaze and the rest of the stake. Both the blaze and the surface of the stake was covered with these fibers—this long
576 fibre—and of course you could not tell how old the blaze was.
577 You could not tell any difference between the blaze. We passed the "Mono shaft," which was about 15 or 20 feet south of the north end line of the Bobtail. I mean the "Oro Fino" shaft instead of the Mono.

On recross-examination the witness further testified as follows:

Mr. Gunn came to me several months after I had made the official survey of the Clara No. 2 to get a copy of the location certificate which I had made of it and given Mahan. I did not give him a plat of that survey nor a plat with the field-notes, and do not recollect that he asked for it. I surveyed the Bobtail and made it 1,340 feet in length by 300 feet in width.

578 THOS. F. HANLEY was then called as a witness on the part of the defendant and testified as follows:

I was living at Gayville, Lawrence county, Dakota Territory, in the winter of '76 & '7, and was engaged in the saloon business. I know the Caledonia location and the Bobtail location in Shoemaker gulch. I was acquainted that winter with Michael Lynch, Michael Heffron, Robert Curlin, and James Manning, and knew some of them for many years. I visited the Caledonia and Bobtail mines with James Manning in the month of Feb. 1877, under the following circumstances: He was stopping with me in Gayville and made his home with me. We had furnished him grub at several places, supposing it was for the benefit of the Caledonia Company. They were then known as the Caledonia Company. On the 27th of Feb., 1877, I insisted on Manning going up [to] the Caledonia in order to ascertain whether there was any one to work there or not, and I went up with him. There was no one at work there then. On the 28th of Feb., 1877, I went up there again with him and arrived there about noon. There
579 was nobody working there that day. He then told me that the reason that there was no work going on on the Caledonia mine was that his partner, Robert Curlin, was down here in Deadwood, in Joe Hayes' place, drunk, along with a man who had a claim here named Mike Early. I fix the date because it was the last day of the month, and on account of several conversations we had at the time in relation to the inauguration of the President on the 4th of March following. We went up to the Caledonia first on Tuesday. James Manning, one of the locators of the Caledonia, was along with me, and for several days prior to the 28th of Feb., 1877,

he was stopping with me in Gayville, and was not at work anywhere. He had been at work for Pierce & McAleer, on their placer claims right at Gayville, before this, and he told me at the time when he went up to the Caledonia mine that Bob Curlin was down here in Deadwood drunk, and that he thought that we would find him at Joe Hayes'. There had been work done at the Caledonia shaft before I was there on the 27th & 28th of February,
580 but I did not see any signs of recent work. The shaft that was sunk by O'Neal & Lackey in the fall of '76 was there on the 28th of Febr., '77. Manning and myself, after leaving the Caledonia, went up to what was then known as the old Bobtail cut, which was in a southerly direction and on the left hand or east side as you go up the gulch. We found Tommy Mahan there that day at work with pick and shovel about 20 feet north of the Clara No. 2 shaft. These was a cut in there, and I cannot be positive now whether he was sinking, but there was a hole or shaft started in this cut, and he was working right there. We stopped and talked with him about 20 minutes. Manning & Mahan saluted each other, and Manning must have heard all that passed at that time. Mahan started to lecture me, and said that I was not doing right in helping the Caledonia boys to defraud him of his honest ground. He talked in an ordinary conversation. Manning was sitting near by. On the first and second day of March, '77, Manning and I came down together to Deadwood, and we saw Curlin; he was what you
581 might call slightly intoxicated. He was a man who spreed it considerably, and it was hard to tell whether he was intoxicated or not. I was hunting for him, and he told me then that he was coming up in a few days, and would then go to work. I then told him if he did not come up and if we did not go to work we might as well quit the Caledonia altogether. My relation with the Caledonia locators was that of intimate friends from the time I first became acquainted with each and every one of them. I know Michael Lynch well, and after the 28th of Feb., '77—I think it was about the latter part of March—I went over the Caledonia ground with him and visited the boundary stakes of the Bobtail location. The boys were then working on the Caledonia mine. Mr. Lynch and I went right up from the Caledonia shaft, where they were working, up what is called a hog-back, and over towards Bobtail gulch, and pointed out where the Bobtail stakes were, and also where the Caledonia stakes were—that is, the north end stakes. I had
582 seen the south or southerly end stakes of both the claims before this. We went right along the edge—northwest edge—and he pointed out to me a dead pine tree. It looked as if it had been burned some at the northwest stake. It was northwest of the Oro Fino shaft. The north centre stake of the Bobtail had a pile of rocks built around it, and it was about as high as that chandaleer (pointing to a chandelier in the court-rooms). The northeast corner stake of the Bobtail was a green tree 12 to 14 inches in diameter, blazed and marked. I do not know whether any of these stakes are now standing, as I have not been on that ground to pay any attention to its since. We found a centre side stake, which was a hewed

post or stake standing between the Caledonia old shaft and a log cabin in Shoemaker gulch. The cabin stood probably fifty feet from the shaft, towards the gulch, in a southwest direction. We did not go to the south end stakes of the Bobtail, but I saw them that spring. One of them was a green pine tree. It stood on the hillside, near the brow of the hill, and I guess was 15 inches in diameter.
583 It was close to the summit of the divide and was blazed and marked; the other was a dead pine stump which stood about 50 feet south of the Bobtail cut, and was probably 8 inches through. The southeast corner stake was a post driven into the ground, and a lot of rock was piled around it. My best recollection is that it was in the month of April, 1877, that I saw these three south end stakes of the Bobtail. I know it was that spring. I did not measure the distance of any of these stakes from the others, but I should judge that the distance from the northwest corner stake to the northeast corner stake of the Bobtail was about 300 feet, and from the tree that marked the southwest corner, which was upon the side of the hill, to the southeast corner stake it was 250 or 300 feet—I should judge that it was about 300 feet. At the time that Lynch and I visited the stakes I have mentioned on the north end of the Bobtail I advised him to cut them down, but I do not know whether he did so or not. I heard him say that they had then cut
584 down the stake that stood between the shaft and the cabin—the stake between the discovery shaft of the Caledonia and the cabin; it was a hewed post *drawn* into the ground—that is, that they had cut it down or tore it up. I was interested in the Caledonia at that time myself. My place at Gayville was a general resort for those parties, and at the time of the official survey I heard them talking about taking down and destroying the stakes of the Bobtail. We had made up our minds to destroy them, but Judge Murphy advised us not to touch any stake that was established by the United States surveyor. The intention was to destroy the Bobtail stakes, and I advised them to do so and stand the consequences. Judge Murphy advised differently, and I do not know whether they followed his advice or their own declaration. I never saw any of the stakes afterwards. I had been over the ground so often and had so many conversations with Heffron, Curlin, & Manning that I cannot recollect the times *as* went, talked about the stakes, and what we
585 should do to hold our claims, but I do not recollect every time I was there. I was up and down there frequently—I expect sometimes 3 times a day—until we sold out, and I have been on the ground only once since. There are several circumstances which keep the dates, the 27th & 28th of Feb., '77, fresh in my memory as the dates of my visit to the Caledonia shaft with James Manning. The first of the month was pay day with us up there then, and the men that we had purchased goods from use- to come to collect their bills, and I remember that. Then there was a good deal of talk at that time about a rebellion or a civil war occurring on account of Tilden being counted out, and Manning and I talked about these things right on the trail. We calculated the 4th of March to fall on Sunday and that the President would not be inaugu-

rated on that day, but on Monday. We were discussing the affairs of state, and we discussed them with Mahan and a man that
586 worked right across the gulch at the Santa Cruz shaft, who came along during the time that we were talking; I do not know his name; he is a little dark-complected man, a little lame in his walk; his name is Robert something; he came along there where Mahan was at work and joined in the conversation. I mean that the Santa Cruz shaft was west and across Shoemaker gulch from the Bobtail discovery. There were several parties who passed over the trail that day that we met and talked with. One was a man named John Goddard and another was known as Dutch George.

On cross-examination the witness further testified as follows:

I got my interest in the Caledonia mine from James Manning. The deed was made out in the name of Mr. Elliott, my partner, at the same time that Judge Murphy got his interest. We were putting up grub & tools for Manning and Curlin and had been promised an interest in the mine a long time previous by James Manning. I do not know where Manning is at present; he may or may
587 not be in the Territory. I have no idea where he is; if I knew where he was I would hunt him up, as he owes me now $800.00. We got 50 feet of the Caledonia from Manning, and Elliott & I owned that together. Judge Murphy got 50 feet at the same time. I had no idea at the time what the value of the ground was; it was not considered very valuable. It was in my saloon that Judge Murphy advised us not to cut down any official stakes of the Bobtail. This was in '78. I think it was early in the spring of '78. I only remember *he* advising us once. He was advising the Caledonia boys and I was listening. Mike Heffron was there, Robert Curlin was there, and, I think, Mr. Lackey was there. The boys came down to our saloon, in Central, and wanted Elliott & me to go up. They were very excited and wanted guns. They did get a gun of mine and brought up there. I said to them that I knew what I would do, and I advised the cutting down of the stakes. Murphy said, Boys, you must be very cautious about meddling with any stakes put down by a United States surveyor or a deputy
588 United States surveyor. My idea was to protect the Caledonia title against the Bobtail claim. I supposed we could do so by keeping them out of possession. I did not know nor believe at the time that there was no Bobtail title, but I believe that there was, and I believe that you (addressing Judge Clagett) believe so to- or you would not have purchased a portion of the Bobtail for the protection of the Caledonia company. I do not know what your object was, but I know that you purchased it and that I was at the bottom of it too, and worked the thing up for you and can tell you about it any time. I probably passed over the trail, passing by the Caledonia & Bobtail discoveries, during the winter and spring of '76 & '7 a hundred times. I was keeping saloon in Gayville at the time, a business that keeps a man pretty closely at home, but I go outside and look after other interests. I had other business besides the saloon, and, like every other man that came in here,

I was looking for something out of which I could make some money. When I say I was over the trail probably 100
589 times, I mean from October until the summer of '77. I may have been there 3 times a day sometimes, and at other times not more than once a week. I was there twice in Feb., but did not go up to where Mahan was at work the first time, but I saw him at work at the Botail cut. He was picking & shoveling, and, as I remember, was starting a shaft right in the bottom of the cut within a few feet of the trail—no farther than from here to the door. We went right where Mahan was at work, and when we first went there he was picking and shoveling. I believe I know where the Bobtail discovery shaft is. I got an idea where it was the fall of '76. The hill slopes downward there, and Mahan was digging at the place. The day I went up there—the 28th of Feb., 1877—he was sinking a shaft. I saw nobody at work there with him at that time. It might be down five feet, but I will not swear that it was. Mahan and I were not the best of friends at the time. I merely spoke to him when I met him. He accused me of backing up the Caledonia boys and depriving him of his
590 honest rights. I bade him the time of day as I came up, and we got into conversation and we talked about several things. I told him to let the Caledonia boys go and they would sell out the mine for a good stake; that they were all poor men struggling for a living, and to let them alone until such time as they could sell out. The idea was with me for Mahan not to cause the Caledonia boys any trouble; that there would be a prospect of selling the mine soon, and when the boys got their money then he could come in with his interest. I don't think we had the mine bonded at that time, but we had several parties in view. There were California parties here then with whom I was acquainted. Mr. Baley, I believe, was one. I do not know when he left here. Mr. Mahan started the conversation. He came over some 8 or 10 feet towards us, sat down on a rock, and he and Manning and I talked there for about 20 minutes. In addition to talking about the Caledonia and the Bobtail we conversed about politics and the prospects of war and about counting in and counting out
591 presidential candidates. When Lynch & I went up there, at the time that he showed me the north end stakes, we went to look at the Caledonia stakes, and he pointed out to me the north end stakes of the Bobtail at that time and asked me what should be done with them. I advised him to destroy them. I saw the west side centre stake of the Bobtail at that time and before that time in the place I have mentioned; it was a hewed stake 5 or 6 inches in diameter, 5 or 6 feet long, driven into the ground; this stake was shown me by Curlin & Manning several times and was pointed out to me on the 27th or 28th of Feb. by Manning. I am in no business here, and am not running a saloon, nor interested in one; I sold out four months ago with the intention of going to Colorado; I have been unwell the most of the time for the last four months, a great deal of the time in bed; I have had very little conversation about this case with any one. I went to Lead City the other day

and passed over the ground along with Tommy Mahan; it
592 was pretty near dark when we got up there. I have not talked with parties or showed them the Bobtail stakes or made any declarations to that effect. Lynch and I went directly over to the Caledonia shaft, as I have stated; I was up there as often as two and three times a day some days, because I was interested; several of the Caledonia boys were owing me money and I did not advance anything on the strength of the 25 feet that I owned in it; but I knew the men, gave them money, and would tomorrow if they needed it; I would give them fifty cents if I only had a dollar; they owned other ground—the Ben Franklin and several claims; I did not see that ground almost every day. From the Caledonia shaft Lynch and I went north pretty near to the Oro Fino shaft and Lynch pointed out to me the northwest corner stake of the Bobtail; it was a pretty good sized tree; it was black on one side—on the side facing Shoemaker gulch; it was a dead tree; there was pencil marks on it that was hewed off like as if with an axe; the blaze was as large as a sheet of foolscap paper. I think
593 this was in April, '77. The blaze was not a fresh one, and we went within a few feet of it and could see the writing—some marks on it. Lynch said there is one of their stakes—one of the Bobtail stakes—Tommy Mahan's stakes. We then went on down the ridge, and he showed me where he had put up the Caledonia stake. We wanted to know what he should do with that northwest corner stake of the Bobtail, and I told him to destroy it, chop it down, and make fire-wood with it. We then came back and went east to the north centre end stake of the Bobtail. It was a stub of a tree with a lot of rocks piled around it. I could not say whether it was placed there by nature or by the hand- of men. It was probably 8 feet high and was dead. It was probably 10 inches in diameter. Lynch said there is another of them Bobtail stakes. From there we went to the northeast corner stake of the Bobtail, which is a green pine tree—just a common sized tree. I didn't measure the distance, but I judged it was about 150 feet from the centre stake to this green pine tree.
594 I did not notice any blaze or writing on it and did not go right close to it; it was a green pine, not a spruce tree; the tree was east of me—almost directly east; there might be a blaze on the side facing me, but I did not notice it; I was distant probably 75 feet from it. From there we went back to the Caledonia shaft; these were the only stakes we visited of the Bobtail mine. I met Mr. Lynch last night in at McHugh's; I was not looking for him, and I asked him if he did not recollect the time that he took me on the hill and showed me the Bobtail stakes, and he said in reply, "I won't be telling nothing; that will do; I am going to leave you," and he walked off. That was all the conversation we had; there were several parties present; Mr. Mahan was with me, and we went in there to get a drink and met Lynch at the bar. I suppose I wanted Lynch to acknowledge the truth. I have no interest in this case at all. There was no conversation between me and Mahan, nor between me and anybody else about these Bobtail stakes before I

went into McHugh's to get a glass of beer, and meeting
595 Lynch I happened to ask him about his showing me those stakes; it happened to come into my mind just at that time. After that I was invited up into Judge McLaughlin's office last night and was notified that I would be called upon to testify in this case, and I related there just what I have stated here about the Bobtail stakes and the party who traveled over the ground and showed them to me. I asked Lynch this question: Mike, do you remember the day you & I was up on the hill and you took me over and showed me the Bobtail stakes, and he answered, "I dasn't say nothing." The next I saw he was in Judge Murphy's care; I was merely trying to get him to acknowledge the truth. I met Mahan just outside of McHugh's on the sidewalk, and in a few moments we went in to get a glass of beer. I did not know that Mike Lynch was in there at the time. The first Bobtail stake that I ever saw was the southwest corner—a green pine tree—in the fall of 1876, close
596 to the summit of what was known as Clara Hill. It stood north of Clara No. 1 discovery shaft, probably 150 feet, and right in a little sag.

On redirect examination the witness further testified:

There are two Clara shafts, Clara No. 1 and Clara No. 2. Clara No. 1 is southwest from Clara No. 2, and the distance between them is about 300 feet. After the visit of Manning and myself to the Caledonia discovery shaft on the 28th of Feb., '77, I was up there again on the following day—the first of March—and I found no one there; and I was there again the day following, with the same result. I did not go up to the Bobtail until along about the 10th or 12th of March, and I saw Mahan there working. I know when the excitement was in relation to relocating and recording claims about the 15th of March, '77, and I had occasion to visit the mining recorder's office about that time for the purpose of relocating claims, and I relocated the Washington, situated north of the Father
597 De Smet. I was at the mining recorder's office several times during the day. Judge Murphy was there, Mr. Carr, the recorder, and Tom Bently. I was there the night before, and Judge Murphy told me to see the boys and have them relocate and record their claims. I do not know whether he was a deputy of Mr. Carr at the time, but he was there in the office with him at the lower end of Gayville—Mr. Colburn's assay office. I met Mr. Mahan there that day, and I saw him give his notice of relocation of the Bobtail to Thos. Bentley, deputy mining recorder. The reason I remember this circumstance is this: I had recently come from Southern California, where gold & silver was the currency of the country, and where we did not often see greenbacks. Gold dust was the currency here at that time. Mr. Mahan passed a five-dollar greenback to Tom Bentley to pay for recording the Bobtail notice. Bentley turned around and asked Mr. Carr for change. Mr. Murphy and Johnny Swift were both there in the office. I was not at the Bobtail on the 15th of March nor for about a week afterwards. I

saw a notice of location and a supplementary notice
598 posted there, which I read. Thos. F. Mahan'- name was attached. I think it bore date March 15th, 1877. It was written on paper and claimed 1,500 feet, running northerly and southerly, and 300 feet in width. I saw that notice there 3 or 4 times. To the best of my recollection I saw it there the 23d or 24th of March. I did not see it the first time I was up there after the 28th of Feb. I saw Mahan to work there [from] the first to the 4th of March, but not after this notice had been put on record. I think I passed by the Bobtail 3 or 4 different times after the 28th of Feb. and before the 15th of March, but I did not go by there after the 15th of March until the 23d or 24th of March. I found no one at work at the Bobtail on any of these trips except Mahan that I remember of. I passed close to the Caledonia discovery shaft on these trips, and saw no one at work there the last days of Feb., nor until the 3d of M'ch, and I know positively there was no one to work there on the 3d or 4th of March.

On recross-examination the witness further testified as follows:

599 If I said I was at the Bobtail on the 10th of March that was a mistake. I did not mean to be so understood. I intended to say from the 1st to the 4th. The reason I know those dates is, I was very anxious that the Caledonia boys should be at work. I went to Lead City on the 3d of March for the purpose of assertaining if the Caledonia boys were going to work, and passed right by the Bobtail. Mahan was at work there then. I went over on March 3d to Lead City with Mr. Manning; and one of the reasons that fixes that date in my memory was that on the next day we were looking for news of some fussing going on at Washington with reference to the President. I do not know that there was telegraph communication in those days between here and Cheyenne. I was at the mining recorder's office on March 15th, 1877. My place of business was a few doors above. I do not know whether Murphy had an office there or not; he staid in the recorder's office at that time mostly. Several weeks afterwards Murphy took
an office over — store; it might be a month afterwards.
600 I am certain that Murphy was there and made his place of business there when he was in Gayville. It was about 11 o'clock on the night of March 4th when Murphy told about the ratification of the Indian treaty, and that it was necessary to relocate and re-record claims, and I saw Mahan at the recorder'- the next day. I am positive Tom Bentley was there. I also am positive that James Carr was there on the 15th of March. I was putting up grub for several parties in those days who were prospecting, and paid Cutler & Childs as high as $200 a month for tools and provisions for men. I knew many of them for years before, and I was promised an interest in their mines, and so was interested in their having their claims relocated, and would take the boys as they came in to the recorder's office; and on one of those visits there on that day I saw Mahan hand Bentley the relocation notice of the Bobtail for record, and he told him that the cost would be two dollars, when Mahan

handed him a five-dollars greenback, and the notice was filed.
601 I do not know whether it was recorded or not at that time. I was anxious that the Caledonia relocation should be recorded first, and noticed what Mahan was doing with the Bobtail relocation on that account. I am positive I saw Mahan at work at the Bobtail cut, picking and shoveling, on the 3d of March, '77, the day before we expected news of a disturbance at Washington on account of the inauguration of the President, and am equally certain that I saw the relocation notice of the Bobtail posted near the Bobtail cut about the 23d day of the same month on a stake or a stump. There was also another notice posted near this cut on a board or in a candle-box near the Clara No. 2 shaft, but I did not read it. The paper on which the Bobtail notice was written was about 6x10 or 8x12 inches in size. I think no one was working there at the time. I think I was there between March 20th and the 1st of April more than once, and I saw the Clara No. 2 boys working, but do not remember the date. I was watching the Bobtail in those days
602 and trying to get the best of *of* it. I saw Mahan working there on the 27th and 28th of February, 1877, and on the 3d of March following, at the Bobtail cut; no one was then working on the Clara No. 2 shaft, nor did I see any fresh work there. There might have been a windlass there. I made, probably, 20 trips to the Caledonia to one to the Bobtail that winter and spring. I know I saw Moore and Gibbons at work on Clara No. 2 in April.

603 THOMAS BENTLEY was then called as a witness on the part of the defendant and testified as follows:

In the winter of '76 & '7 I was living here in Deadwood. I knew Thos. H. Carr then; he was acting as mining recorder of the Whitewood quartz mining district and living at Gayville in this county, and during a portion of the month of March, 1877, I was acting as his deputy. I commenced about the 15th of the month to act as deputy and continued for 3 weeks, running into the first week of April. There was there two books in the office—number one [of] which was full and which was the old original record. On or about the day I commenced to act as deputy mining recorder for Mr. Carr I have a distinct recollection of seeing Thos. F. Mahan there in the office at Gayville. He was getting some claims recorded. I know that he had the Bobtail recorded on that day of my own knowledge, from the simple fact of having filed the location notice for him at that time. I was acquainted with Mr. Ma-
604 han before that time, and, being a stranger myself in Gayville, I remember distinctly of his coming in there at that time. I remember seeing the notice of the location of the Bobtail lode, which I filed for him that day upon the records of that district afterwards. The original location notice of the Bobtail was recorded before I went there. I cannot swear positively who it was that copied this location notice that Mahan left into the record—that is, made the rerecord. For the first week or two after I went there but few of the location notices were recorded. They were merely filed and put away on account of there being so many. The last week I

was there I spent on the books, copying into them the supplementary records. The notice that Mahan brought and which I filed was a copy of the original location of the Bobtail and a supplementary location notice attached. What refreshes my recollection is that when I went there first I was not familiar with the routine of the office and I got my instructions from Judge Murphy, and
605 Mahan came in with his Bobtail notice the first or second day that I was there—either the 15th or 16th of March. The supplementary record was written by Judge Murphy for Mahan. I do not know what has become of the books. When I left there were 3 or 4 of them. I know Tom Hanley. I remember seeing him there and also Jabez Chase about that time, but I cannot say whether it was on that date.

On cross-examination the witness further testified as follows:

I do not know who it was sent for me to come up there, but understood that it was Judge Murphy. Johnny Swift sent down for me to come up that morning, and he was there when I arrived. He had been sent for himself to assist in the office there between one o'clock in the morning and daylight.

We were sleeping together when the messenger came for him, and he waked Swift up, and Swift went at once. About 11 o'clock
606 I was called to go up, and got there about noon. We filed a great many supplementary locations that day—probably a hundred and fifty to two hundred—and I remember distinctly that I took this Bobtail notice and filed it. I went to the old record and copied the original Bobtail notice. I don't know Billy Gunn, and there is nothing that brings to my mind distinctly hearing anything of the relocation of the Clara No. 2. I do remember of hearing about the Queen of the Hills after that and of giving Mahan a copy of the original location. I filed the Paul Jones in San Pit gulch and one or two other claims there on that day. I do not recall the names of any others now that I filed on that day nor on the following day. I did not do all the filing. There was nothing in particular in regard to the mine that passed between Mahan & myself at that time further than my going to the books to get a copy of the original record for him. I do not remember what the number of that notice was. It was some
607 days after that; I put it in the book. I think it was a new book of 3 or 4 hundred pages. Before this there were only two books. I copied this supplementary notice into the new book. I never saw the record of that Bobtail location after I left the office. I might have filed a dozen or more of these supplementary notices myself the first 3 days, but Judge Murphy done the principal part of the filing at that time and I was doing copying. I cannot tell how many claims were filed within those 3 days. I think that before I went up and went to work there there were between 50 & 100. I have a general recollection that there were a great many claims filed. I left the office some time in April, and at the time I went there it was down under the hill in Colburn's assay office. When I left it had been moved up on the hill, and was upstairs. I have

not been enquired of by any one about my knowledge of the Bobtail record that I know of. I was subpœn-ed here as a witness by the deputy sheriff on Thursday, and I had no conversation
608 about this matter before I was subpœn-ed, and had no occasion to refer to the record of the Bobtail claim at any time since I left Carr's office until I was subpœn-ed as a witness, and I had no conversation with any one since I was subpœn-ed up to the time I entered the witness box about what I knew except with Judge McLaughlin.

On redirect examination the witness further testified:

I made a copy of that location notice which Mahan had filed the next day or a few days afterwards for him. Judge Murphy & myself were the only persons copying there until the arrival of James Carr. Thos. Carr, the recorder, was a very indifferent scribe.

On recross-examination the witness further testified:

Thos. H. Carr was there that first day I went up there, but did not remain there all the time during the 15th, 16th, and 17th of March. I do not know whether he was away from Gayville
609 or not, nor do I remember whether he was there when Mahan came in with the Bobtail notice for record. I do not know that he was on a big bender down here in Deadwood for a day or so before I went up and for some time afterwards, but I do know that he was in the office when I went up there and was pretty full, and I know to a certainty that he was in Gayville on the 15th day of March, 1877. I do not remember his being there every day until I quit.

610 DENNIS QUINN was then called as a witness on the part of the defendant and testified as follows:

I worked on the Bobtail mine in the fall of '77, some 12 or 14 days, along with a man named Jerry Cariso. He worked every day that I did, and I was paid four dollars a day. No work had been done there before we went there. It was, I think, about northeast from the old Caledonia workings; I cannot state how far. We excavated a cut, the distance of which I cannot now give, and then we started a tunnel from the face of the cut and run that 16 or 20 feet in slate and quartz, and in the face of the tunnel the rock was quite hard; we did no timbering. My recollection is, we commenced this work the last of Nov'r, '77.

On cross examination the witness further testified as follows:

I do not know where the east side line of the Caledonia is. I got my pay some time after I did the work. Mr. Cariso hired me and told me to stop. None of the Queen of the Hills men ever interfered with us or our work in any way. Mr. Delaney was
611 working in a shaft south of where we were at work, about 300 feet, and knew that we were working there.

612 JAMES MONTGOMERY was then called as a witness on the part of the defendant and testified as follows:

I am a miner by occupation, and have lived in the Black Hills a little over four years. I know where the Bobtail claim is and became acquainted with it about the 23d of April, '76. I went up that way prospecting with a man named Kelly, and looking for the Mannuel boys. I found old man Chizum and his son working on the Bobtail. This was on Monday; have resided in Lead City mostly since. The general thoroughfare for travel of parties living at Lead coming to Gayville & Deadwood—that is, foot passengers—was across the hill, over the trail, down Shoemaker gulch, and this trail at that time passed right by where Chizum and his son were at work; before this I had passed over that trail a number of times. I remember passing there between the 20th and the last of March, 1877, and I saw two new notices there; one was a location notice of the Bobtail, and the other of Clara No. 2. I did not read all of these notices, but saw that they were new location notices of these
613 claims. I should judge that the Bobtail notice was 10 or 15 feet east of the trail, if not more, and close by the place where I had seen Chizum at work in April, 1876. I remember now that the Bobtail notice was a relocation or supplementary notice written on paper and posted either on a stump or post. It was hewed and I saw Chizum's name and Tom Carey's name in the notice, and I think another name. I remember these two because I was acquainted with the men. I am not certain whether it purported to be a location notice or a relocation of the Bobtail. I do not remember seeing Mahan's name in the notice. About the last of November, 1877, I went up to the Mono mine with a view of taking a contract to sink a shaft ten feet on it for an interest in it. Boughton & Conk then owned the mine, I believe, and I was negotiating with Mr. Conk about this contract. A Mr. Green accompanied me there, and at that time I saw the northeast corner stake or what was marked as the northeast corner stake of the Bobtail. It was a green pine tree and was blazed and marked.
614 It stood right there (here witness pointed to the northeast corner of the Bobtail map), and it was on the slop- of the hill towards Goldfinch gulch, just over the ridge. On that same day we saw a stub or a stump about 20 feet high and about 300 f't west of this green pine tree, which was also blazed, and a notice on it in pencil writing at north/west corner of the Bobtail. The Mono discovery was south of the line between these two stakes. It was some time in the fall of '77—the latter part of Nov. or 1st of Dec.—that we saw these two stakes.

On cross-examination the witness further testified as follows:

I was introduced to old man Chizum on the 23d of April, '76, by this man Kelly, who was acquainted with him, and also to his son. I would not be certain whether he was the son or not. Old Chizum is a tall, spare man, a lightish, and I would take him, if I recollect right, about six feet high. I told John Flaherty what I knew about

the Bobtail. I think it was towards the latter part of March, '77, that I saw this notice of the Bobtail. A man named S. H. Steele was cabining with me, and he left for Rapid on the 17th or 18th of March, and it was a few days after that that I saw this notice
615 of the Bobtail as I was going over to the Hidden Treasure mine, where my brother was at work. I do not think it was after the 23d of March, but think it very close to the 20th. I didn't see anybody at work there at that time. The two notices were within about 20 feet of each other, and the Bobtail was farthest to the north. The Clara No. 2 was posted a few feet east of the Clara shaft, and where it had been graded down. I don't remember whether I saw either of those notices in a box. The Bobtail notice was east of the cut, and I think was posted on the stump. It may be it was a stake about 4 feet high. It was hewed, and the paper was fastened in some way. I could not tell now the size of the paper, nor whether it was foolscap, legal cap, or note paper, but it was white paper. I never had anything to do with the Bobtail. I never was asked any questions by any one before I went on the witness stand about this notice. Flaherty asked me once if I knew anything about the Bobtail location, and I told him that I did; told him the facts about my seeing the Chizums at work there, and having seen these two
616 old stakes there in the fall of '77 that I have described, and also about the south centre stake, and that was all. I have not been asked anything while I was on the witness stand about the south centre end stake, but I saw that several times. I have no interest in the Mono nor in the Congress. I believe I did talk about this matter with my brother.

617 CHARLES RIAR was next called as a witness on the part of defendant and testified as follows:

I came to the Black Hills in March, '77, about the 12th, and have since been engaged principally in mining. I remained in Deadwood 4 or 5 days; then moved up to the head of Goldfinch gulch, just east of the Caledonia mine, and remained there 10 or 12 days prospecting. This was the last of March, '77. I had occasion to cross over the divide between Goldfinch gulch and Shoemaker gulch frequently. Goldfinch gulch is northeast from Shoemaker gulch. I became acquainted with the Bobtail claim while I was there prospecting over the hills and around there. Most of the ground were staked, and I was looking to see if there was not a fraction there vacant. I saw several of the Bobtail stakes at that time. I remember seeing the south center end stake, the east side center stake, the northeast corner stake of the Bobtail mine. I passed right by the east side center stake every day, and sometimes twice a day.
618 It was a stake about 4 feet above the ground, and from 4 to 6 inches in diameter, squared at the top, and had written on it, "East side center stake of the Bobtail mine or Bobtail lode." The south centre stake was a pitch stump about 3 or 4 feet high, and was marked the south centre stake of the Bobtail on one side, and my recollection is that it was marked for the Gold Run on the other. I read this writing myself. The northeast corner was a green pine

tree, which was blazed with an axe. I never was right at that tree, but all the boys that were working there on the Pocahontas told me that that was the northeast corner stake of the Bobtail. It was about 12 or 14 inches in diameter. When I was up there again in the fall of '78 this tree had been cut down and gone. I do not know where Surveyor Kello established his stakes of the Bobtail.

On cross-examination the witness further testified as follows:

I left Goldfinch gulch in April, '77. There was a little
619 trail that run from Goldfinch gulch right by the east side centre stake of the Bobtail over to Lead, and I have frequently traveled on it. This stake stood southeast of the Caledonia workings, right by a little snag or gulch that runs up there from Shoemaker—I should judge about 150 feet. There is there now, I think, a shaft or cut. I was prospecting for quartz and looking for a fraction of vacant ground, but did not find it. The writing on these stakes was in pencil. The northeast corner stake, a green tree, stood about 50 feet down from the brow of the hill, and this little trail passes within about 40 feet of it. James Levy, with whom I had done prospecting that spring, questioned me a few days ago about the Bobtail, and wanted to know if I remembered the location, and I told him that I did, and that was all that was said. I have not talked with anybody else in relation to the matter. I am a miner generally, but am now engaged in carrying a hod, and I have done some walking, but am not a professional walker and never was a sporting man. I went from here to Chicago to walk on a
620 match, and I guess that has demoralized me.

On redirect examination the witness further testified as follows:

The place where the south centre end stake stood is a sloping hill with an angle of about 45° up from the trail or the present road. I never made any memorandum about these stakes. I passed by them in the spring of '77. I saw the south centre end stake some time in June, '78. It was this stump that I have been talking about. I never saw the southeast corner stake that I remember of. The mine was claimed 150 feet on each side of the centre, I think. I don't remember seeing any names on the south centre end stake when I first saw it in '77.

Q. 31. You answer positive you saw the word Bobtail on it?
A. Yes, sir.
Q. 32. Was that written in pencil, too?
A. In pencil.
Q. 33. Any pitch over the pencil marks?
A. No, sir; it was a dry stump—could not be pitched over it.
Q. 34. Could you read it plainly at that time?
A. Yes, sir.
621 Q. 35. Was it old writing?
A. Well, I don't say whether it was old or new.
Q. 36. What is your best judgment on it?
A. Well, stumps can be made old or new by rubbing dirt on it.
Q. 37. Who told you that?

A. I know that a long time; I have known that from Montana.
Q. 38. Did you ever try to make new writing look old?
A. I might.
Q. 39. Have you ever done it?
A. No, sir; I have not that I know of, but I seen others that done it.
Q. 34. Do you know that new writing can be made to look old very readily?
A. Yes, sir.

JOHN A. MCMASTERS was then called as a witness by the defendants and testified as follows:

I am a miner by occupation, and came to the Hills in '76. I know the Bobtail claim; it is situated near the head and on the east side of Shoemaker gulch. I first knew it about New Year's, '77, but never knew anything of its boundaries stakes except one; I knew the discovery stake. I lived at Lead City and know Thos. F. Mahan. He came to me one day at the time that we were posting notices and rerecording claims here and asked me to go over to the
622 Bobtail discovery with him to see the new notice which he had put up. This was about the time that the miners here were relocating their claims. I went up with him and saw this relocation notice with his name to it posted or stuck on a stake where there was a little brush and some old timber 15 feet or more from the Bobtail discovery cut. It was about the same distance from the Clara shaft and right up the hill in an easterly direction or
623 to the right as you would go down the hill. I went right to the notice, as he said he wanted me to see it and see his name. The name of the mine was the Bobtail. We did not stay there three minutes. I never read the notice at all. While we were there he pointed out a tree a long way off as one of the boundary stakes. I did not go to see it. There was nobody at work there on that day.

On cross-examination the witness further testified as follows:

I am a brother of Angus McMasters.

On redirect examination the witness testified:

Prior to going up there with Mahan to see the relocation notice of the Bobtail I was at work across on the opposite side of Shoemaker gulch in a tunnel, and the Bobtail was in full view from the mouth of the tunnel and the dump; so was the Caledonia; and for two or three weeks prior to my going there with Mahan I saw him at work there, I should judge, more than half of the time, any-
624 how. Mike Holland, Billy Barnes, and Alex. McMasters were working at the tunnel at the same time—that is, two would work on a shift. I should judge from what I saw that Mahan worked more than half the time at the Bobtail discovery during the 3 weeks prior to the posting of this notice.

625 ALEC MCMASTERS was then called as a witness on the part of the defendant and testified as follows:

I was living in Lead City Feb. & March, '77, and I worked in those months for Bailey & Durbin in a tunnel on the west side of Shoemaker gulch. A fellow by the name of Mike Holland worked with me. We worked there some in March and run a tunnel 90 to 100 feet in blasting rock. There were only two shifts working. The tunnel was on the west side and the Bobtail was on the east side of the gulch, and we could see the Bobtail discovery shaft from the tunnel. During the latter part of Feb. & the early part of March there were men working there. I saw them, which was about 100 feet from the tunnel, as near as I can get at it, somewhere in the neighborhood of 100 feet. I saw Tommy Mahan was working there. I also saw Mike Gibbons, Mattie Moore, & Billy Gunn working there. I use- to go over to their shaft to sharpen our tools. Tommy Mahan use- to be backwards & forwards there. I suppose they were all together at that time. I cannot tell how much work Mahan did.

626 On cross-examination the witness further testified as follows:

We commenced this tunnel in February; cannot tell the date exactly. I think now that we completed it in March. We were there the month of Feb. & the month of M'ch. Little Billy Varnes worked there a few shifts. Jack McMasters was there, back & forth, working at the same time. He located the tunnel and sold it to Bailey & Durbin, and he kept our time.

627 ROBERT MCLEARY was then called as a witness on the part of the defendant and testified as follows:

I came to the Black Hills here the 16th of Feb., '76, and in the following winter I had a mining location on the west side of Shoemaker gulch called the Santa Cruz, and I worked upon that claim during that winter near the northwest corner, as the discovery is within a hundred feet of that corner. I worked only a few days in January, but I worked nearly the entire month of Feb. and down to about the 20th of M'ch. From the place where I was at work I had a good view of the Bobtail discovery and of the Caledonia workings, and I saw Tommy Mahan at work at the Bobtail discovery in the latter part of Feb. and the forepart of March, 1877. Another partee worked with him there a few days in March. A man by the name of Dickey worked with me for awhile in February. He was one of the locators of the claim. I was at the Bobtail discovery on my way over to Lead City on the 28th day of February,
628 1877. I found Tom Hanley there talking with M. Mahan. I knew Hanley quite well, as he was in business at Gayville. I remember this date, because at the time of the relocation of claims here, which occurred on the 14th or 15th of March, '77, our meeting there on the 28th of February was referred to. This was the time that the miners generally were rerecording their claims, and I went up to the recorder's office on Deadwood gulch to record some placer

ground that I had. Mahan worked almost every day there after the 28th of February up to the time that I quit working on the Santa Cruz. I went placer mining about the 20th of March. When we met at the Bobtail that day I had a few words of conversation with Mahan & Hanley. Jim Manning was just below where Hanley & Mahan were. No one was working there with Mahan on that day. I know some of the boundary stakes of the Bobtail. I saw the south end stake, or stump, in M'ch, '77. I don't know but I saw that in February, and I saw the southeast corner stake of the Bobtail in March, '77. The south centre
629 end stake, which would be the centre between the two end stakes, was a hewed stump. The southwest corner was a green pine tree blazed on one side. I think the southeast corner was a piece of a dead tree that has been broken and set up, and stone was piled around it. I knew they were Bobtail stakes by seeing the name "Bobtail stake" on each of them. I read the writing. The west side centre stake was a hewed stake, and it stood in a southerly direction from the Caledonia discovery—probably 125 feet. These stakes I myself saw standing there in March, '77. The distance between the south centre end stake and the southwest corner stake I judged to be 150 feet, and a similar distance was between the south centre end stake and the southeast corner stake. I should judge that the stump was from 3½ to 4 feet high, 12 to 18 inches in diameter, before it was hewed. It was marked the south end stake or south center end stake of the Bobtail lode. I do not remember of any other marks on it that I noticed. My recol-
630 lection is that the stump was squared. It was on a side hill sloping towards the gulch. The southeast corner stake was marked southeast corner stake of the Bobtail, and the southwest corner was marked southwest corner of the Bobtail. All the marking was done with a pencil. These and the discovery stake were all the stakes that I saw. I was over the trail there several times that spring, and my recollection is that I was up there at the Bobtail on or about the 15th of March, 1877, between 3 & 4 o'clock in the afternoon, and I saw that Mahan had made a relocation of the Bobtail mine. A notice was written on paper, and this notice that I saw there on the day I mention was not posted there the day I met Tom Hanley. Tommy Mahan's name was signed to the relocation notice, and the name of the lode in it was the Bobtail lode. The Caledonia — working were in plain view and could be seen from the discovery of the Santa Cruz. I saw no person at work there on the day that I met Hanley & Manning up at the Bobtail discovery with Mahan, and no
631 one was working there in February while I was working at the Santa Cruz discovery; if there had been I would have seen them; I could not help seeing them very well if there had been any one at work there, nor was there any work done there by any one for a week after the 28th of Feb. If any one had been at work there I could not help seeing them. The first work done on the Caledonia after the latter part of Feb. was about the 20th of March, and some time about that date Jim Manning & Robert

Curlin went to work at the Caledonia shaft. I saw the work that had been done on the Caledonia in the fall of '76, after the shaft was sunk, and there was quite a body of ore on the dump, and I did not see any apparent increase of the pile of ore or the dirt on that dump until the summer of '77.

On cross-examination the witness further testified as follows:

632 The Santa Cruz was located the latter part of September, '76, by D. C. Dickey, and I got an interest in it in the latter part of Feb., '77. I had worked a few days on it in January; worked most of February and March, until about the 20th of the latter month, running cuts, sinking holes, and prospecting at the discovery near the northwest corner of the claim. Dickey worked there up to about the middle of Feb. I understand now that he is in Arizona. No one worked on the Santa Cruz during that time except Dickey & myself. I lived on No. 3, Deadwood gulch. The Santa Cruz is within 400 feet of the divide between the Bobtail and Gold Run; I was cabining with Robert Neill; I saw the south end stakes of the Bobtail the same day that I saw the relocation notice, and I had seen them before that, along about the first of March. I went with Tommy Mahan to the southwest corner stake, in March, '77; I saw all the south end stakes that month; I did not go to the north end stakes; Mahan pointed out to me the course of the claim. I have only appeared in this court as a witness during the past

633 year twice, except once in a little case of my own. I was a witness in the water case; I am a witness in this case. The south centre end stake of the Bobtail was standing southeast from the Clara No. 2 shaft, I should judge, about 75 feet. It was 3½ to 4 feet high when I saw it in Feb. I noticed no other writing on it except that I have described. Tommy Mahan'- name, I think, was on it. I have been trying to sell the Santa Cruz mine. A relocation notice was posted on a stake at the discovery —, and stood above the cut 8 or 10 feet in an easterly direction. I went up and saw it. I think the stake was between 6 & 8 inches in diameter, and was planted firmly in the ground. There was a few little shrubbery growing on the hill around there—brush—but the notice could be plainly seen from the trail. I fix the date by the time the miners were relocating & rerecording their claims. I relocated Robert Neal's placer ground in Deadwood gulch on that day. The Bobtail discovery was about 5x6 feet wide & 8 or 9 feet deep. I have been

634 mining for 7 or 8 years. Mahan was doing some grading at that time, and the shaft was that depth before he commenced the grading, and on the 28th of Feb. he was working in that shaft. I put this 8 or 9 feet depth at the upper side of this shaft, the lower side 5 or 6 feet. I saw Mahan from the Santa Cruz discovery working at the Bobtail on both the first and second of March, I think. I saw him there sinking on the shaft & grading. I do not say that he worked every day, but he worked several days there to my knowledge after the 3d and before the 30th of March. This was about 20 or 25 feet north of the Clara No. 2 shaft.

635 JABEZ CHASE was then called as a witness on the part of the defendant and testified as follows:

I have been in the Hills since Feb., '76, mining mostly. In '77 I was living at South Bend, in this county, running a quartz and saw mill and in March I had relocated and rerecorded the Hidden Treasure, Chief of the Hills, & Amicus mines. On the afternoon of the 14th of March I received a telegram from Cheyenne from the secretary of the Black Hills Gold Mining Company in substance that the Secretary of the Interior, of Washington, had advised the relocation of all claims in the Black Hills that had been located during the time that it was considered a part of the Indian reservation and directing me to relocate the mines that that company was interested in. I was then acting superintendent of that company and in charge of the Hidden Treasure mine and mill, and proceeded at once to relocate the Hidden Treasure and Chief of the Hills mine that afternoon, and took the notice to the mining recorder at Gayville the same evening. The Amicus mine was situated near
636 Lead City, and on the next day I wrote out the notice for the Amicus mine & took it over and posted it up on the mine and had it recorded at Gayville. I passed over the trail by the Bobtail mine to the Amicus ground towards evening. It is possible that it was the 16th of March that I relocated the Amicus, but I think it was on the 15th; I am certain it was one or the other of these dates. When I reached the Bobtail work I found Mr. Mahan there and had a talk with him. I am certain of that, because I was well acquainted with him, and some other partys was there with him. Some 8 or 10 feet distant from the cut in an easterly direction a new notice was posted on a stake. The paper looked new; I took it for a relocation notice of the Bobtail mine, but did not go to it and read it. We talked about the matter of relocation, he claiming that he did not think it was necessary to relocate, while I claimed and contended that it was, and we had quite a little talk over it. I was over that trail once or twice a week during the winter and I met him there quite frequently before this; saw him at work there, but did
637 not see this notice before. I told Scotty Jenks, who had charge of the telegraph office at that time, I think, here, that if he had any claims to relocate them at once, and informed him about the dispatch and its import, as it was in cypher. Thos. H. Carr was the mining recorder, and had his office at Gayville, and he was there that evening and the next day. I know this because we filed the location notices of the Hidden Treasure and Chief of the Hills on the evening of the 14th with him, both at the same time, but next day found the Chief of the Hills marked filed as of the 14th, and the Hidden Treasure notice marked filed as of the 15th of March I and Mr. Deney, the book-keeper for the company, took him to task about the Hidden Treasure notice, and he then gave me a certificate, over his signature as recorder, that it was filed on the 14th of March, 1877, and among the first notices left for record. I know that it was the first notice filed there on that day under this information that relocation was necessary. There

638 was quite a rush to the recorder's office on the 15th & 16th of March.

On cross-examination the witness further testified as follows:

I am certain I received that dispatch from Cheyenne on the 14th of March, and that I left the notices for those two claims with the recorder that evening for record, and that the Hidden Treasure notice was the first that I know anything about being received at the recorder's office. I think I rode my horse over the trail the next day to the Amicus mine, and I saw that new notice posted there at the Bobtail mine, either the 15th or the 16th of March. I know where the Clara No. 2 shaft is as well as the Bobtail, and this notice was 30 or 40 feet from it in a northerly direction and 8 or 10 feet east of the Bobtail. I did not see Mahan working on this day, but think there were two men there at that time. I do not know now who they were. I know Billy Gunn, and have seen him at these mines and talked with him, but do not remember whether he was one of the two men there with Mahan or not. Desvey & myself examined the mining records
639 on the 15th of March to make sure about the Hidden Treasure notice being recorded, and we found that the Aurora notice, which was not filed until the 15th, was recorded ahead of the Hidden Treasure. Mr. Carr had plenty of leisure to record our notices on the day they were filed. I will not swear positively that there were no certificates filed before the Hidden Treasure and Chief of the Hills, but I feel assured in my own mind that there were none. The stake on which the Bobtail notice, or what I took for the Bobtail notice, was posted was a hewed one, some 6 inches in diameter, perhaps, and was plainly visible so that anybody could see who was passing by there.

640 ROBERT SEWELL was then called as a witness on the part of defendant and testified as follows:

In the latter part of Feb., '77, I was living on False Bottom, in this county, and engaged in prospecting. A part of the time since I lived at Lead City, and for the last year or so on Bobtail gulch, employed in mining. On the last day of Feb., 1877, I was at Gayville, and never having been to Lead City before that time, I went over there, and traveled up the trail on Shoemaker gulch by the Bobtail mine. I saw Mr. Mahan there that day at work in the Bobtail shaft with pick. No one was working with him. I am positive about this date, and I know that it was the 28th of Feb., 1877; and on that day I saw what purported to be the southwest corner stake of the Bobtail lode. It was a pine tree—small tree—blazed, and had written on it "southwest corner Bobtail mine or lode." The reason why I am certain of this date is because, being engaged in prospecting, I came to Gayville that morning to buy a rock hammer, and after I bought one I concluded to go over and see
641 Lead City, not having been there before. I made an entry of that purchase in my memorandum book at that time.

On cross-examination the witness further testified as follows:

Am now living at Terraville and at work for the Golden Terra Company, an- was mining there until within the last 8 or 10 days. I quit because I was not feeling well. About a week ago John Noonan met me at Lead — and said to me that I was around here in '77, and ought to know something about the Bobtail, and I related to him substantially what I knew about, as I have stated it here, and he then said he would have to have me as a witness. I returned from Lead City that same day, but came over the hill further west—on the west side of Shoemaker gulch. Bobtail mine is on the east side. I was out at Elkhorn prospecting about a year ago and when I came back I went to work for the Golden Terra Company, and worked for it right along until 8 or 10 days ago.

642 I know Mahan by sight, but have no acquaintance with him. I — know- him by sight for two or three years, and the first time that I ever saw him that I remember of was on the morning of Feb. 28th, 1877; I had some talk with him there at that time, but it didn't last over a minute or so. That southwest corner stake of the Bobtail stood to the east of me on my return, and to the west of me as I went over; I happened to see it as I was going over, and went to it and read it. The tree was about a foot in diameter. I have never seen that tree since. Mahan was working there by this southwest corner on the day that I went over to Lead —. This corner was a tree and was not cut off at that time. I was upon that ground about a week ago with 3 or 4 parties. Nooman was along, and his is the only name that I know. I have not been subpœn-ed, and I quit work about 10 days ago because I was sick. Noonan & I overtook these other parties about half way up the hill. Noonan did not ask me to go there, but I said I wanted to go there to see the ground, when informed that he would have me as a witness. I

643 have no interest in this suit. Thos. Mahan was picking and shoveling when I first saw him on the ground. I don't know how deep it was, but when he stood up in the shaft his head was below the level of the ground. There was no windlass at that shaft. He was picking and shoveling. The man that I bought the rock hammer from was an old German, and I haven't seen him since June, '77. I made a memorandum of the purchase at the time that I bought it, and have that memorandum now; and I carried that rock hammer with me in my hand. This date occurred to me a week ago, but I did not look at this book until after Noonan spoke to me. I then looked at my memorandum book to be certain and put it back in my trunk, and it remained there until yesterday. The leaf is loose—a good many of the leaves are loose—and I found some of the loose leaves in my trunk. That is the only purchase I made that day, and the reason I made it was because I was in partnership with a man on False Bottom, and the purchase of the hammer was on partnership account. The entry is in my own handwriting.

644 (Here witness was directed by Mr. Clagett, counsel for plaintiff, to duplicate on a sheet of paper the entry purporting to have been made of the purchase of the rock hammer, Feb.

28, 1877, which the witness proceeded to do, and which was inspected by counsel & the court.)

I left the trail when I went to the southwest corner stake of the Bobtail, and also when I returned, coming down on the west side of Shoemaker gulch. The trail bends around to the west after passing over the Bobtail, before reaching the top of the divide. This stake was about 175 or 150 feet in a westerly direction from where Mahan was at work, as near as I can recollect. I did not know him when I saw him at work there on the 28th of Feb., '77, and it was over a year afterwards when I saw him again, and I immediately remembered that he was the same man I saw there at work.

On redirect examination the witness further testified as follows:

I made this entry which the court is now examining on the same morning that I bought the hammer, and the other entries on the same page at the time of the occurrence of the matter recorded there.

645 JAMES BLODGETT was then called as a witness on the part of the defendant and testified as follows:

I live at Central, and am engaged in mining on Cannon gulch, on the Goldfinch mine. In the year 1877 I owned a half interest in the Goldfinch lode. It is east of Shoemaker gulch about a half mile, probably. I know the Bobtail location, and it is southwest of of the Goldfinch—that is, the Bobtail discovery would be about 1,000 feet southwest of the Goldfinch. I knew some of the boundary stakes of the Bobtail in 1877, and first saw them between the 15th and the 20th day of March of that year. These were the northwest corner stake and the north centre end stake. The northwest corner stake was a stub of a tree and the north centre end stake was a piece or a limb of a tree blazed on two sides and stuck up in a pile of rock; the marks on them was very dim. I again saw them about two weeks afterwards. The stub was marked the northwest corner, Bobtail lode, and the other was marked "north centre end
646 stake, Bobtail." The blazes on both were old-looking. These two stakes stood about 150 feet apart.

On cross-examination the witness further testified as follows:

Never did any mining until I came to the Black Hills in '75. I began work on the Goldfinch in March, '77, for myself. I own a half interest in it. We located the claim on the 22d of Feb., 1877. I do not think the northwest corner stake was 25 feet high. I think it was 8 or 10 feet high. The way I fix the date is this: I was working down in Deadwood gulch before this and I quit on the 10th of March, and I calculate from that that I was up there and saw those stakes somewhere between the 15th & 20th of that month. There was a considerable snow on the hillsides at the time, but not much on the ridges

647 JAMES BLACK was then called as a witness on the part of defendant and testified as follows:

I reside at Lead City and am engaged in running Marshment quartz mill at Lead City. I was living in Deadwood in Feb., '77, and on the first day of March of that year I moved up to Anchor, and on the following day I passed over the trail from Gayville to Lead City and saw Thomas F. Mahan at work at the Bobtail discovery shaft; he was picking and shoveling there. I was back over that trail again about the 20th, but no one was at work there or in that neighbor-ood. I saw a stake and new notice there at the Bobtail discovery. I did not see this notice when I was there on the second of March. I did not go to, it and cannot state what it was, but saw it from the trail. It was east from the cut some distance. I went over to Lead — to see about work.

On cross-examination the witness further testified as follows:

I know it was the second of March because I moved to
648 Anchor from Deadwood on the 1st of March. I remained in Lead — about two hours. Mahan was at work with pick and shovel and he had a wheelbarrow; he told me that he was at work on the Bobtail. There was a shaft further south, about 50 feet, I think. I think the Bobtail shaft at which Mahan was at work was about 10 feet deep. He had no windlass on it. No one was at work at that shaft south of where Mahan was. The notice which I saw was right up the hill from the Bobtail cut in an easterly direction, and could be plainly seen from where I stood.

649 W. S. GREEN was next called as a witness on the part of defendant and testified as follows:

In the spring of '77 I worked on the Mono discovery shaft for Mark Boughton, and sunk 12 feet. I saw the 3 north end stakes of the Bobtail lead there. The Mono discovery shaft was *that* 50 feet distant from the north centre stake of the Bobtail, which was a stump of a tree placed there with rock piled around it. It did not grow there. The northeast corner stake was a green tree blazed and marked, "Northeast corner stake, Bobtail." The northwest corner stake was a dead pine stub. I also saw the east side centre stake, which was a hewed staked. I saw these stakes several times. We located the Alleghaney mine on the 13th of March, and went to work on the Mono, I think, on the 21st or 22d of M'ch, '77. I saw the Bobtail notice posted; after the 17th of March two or three days; it was a supplementary notice; something about the Indian treaty, and I read it, and also the notice of the Clara No. 1, the same day.
It was signed by Thos. Mahan, and it claimed the Bobtail.
650 It was a long notice, and was written on paper. Ed. Gallagher was along with me at the time.

On cross-examination the witness further testified as follows:

Tommy Mahan spoke to me two days ago at Lead City. He asked me if I was not working on the Mono in '77, and if I knew where

any of the Bobtail stakes were, and I told him I did, and that I thought I could find the places where some of them were. He then said he would go with me, and as I was going to Central we went over, and I pointed out the places where they were as well as I could. Mahan did not show me any stakes, for I knew where they stood as well as he did. The stakes are not there now. I saw those stakes 3 or 4 times in March, '77. I know the time we located the Alleghany mine, and I fix the time with reference to that. My partner and I were looking for a fraction of ground which we understood to be in there somewhere to the east of the Clara and the Giant.

651 This is the second time that I have testified in this court. The other time I was a witness in the water case. It was in March that I saw Mahan at work at the Bobtail shaft; I can't fix the exact date, but it was about a week after we located the Alleghany. No one was working with him. When we were there he was not working, but the general appearance of things—tools lying around—satisfied us he was there for the purpose of working. The notice was standing up 25 or 30 feet due east of where the work was going on upon the bank. I went up and read it. I read the supplementary part of it. I think it was fastened to a stump about a foot in diameter; that is my recollection; cannot say whether it was blazed or not. It was a long paper—nearly two feet in length, and contained something about the Indian treaty and relocation of claims. It was probably 7 or 8 inches wide. The stump, I think, was six or seven feet high—a dry stump.

652 HENRY COWEN was then called as a witness on the part of defendant and testified as follows:

About the 15th of November, 1878, I worked two shifts for Tommy Mahan on the Bobtail, just north of the Clara No. 2 shaft. I think there were 13 of us in all, and we worked one day and one night and received $3.50 a shift. Anthony Young was one; Charley Donan was another. I do not remember the names of any of the others. We graded this side or north of the Clara No. 2 shaft. Anthony Young had charge of the men. This work was done on the Bobtail, and is the only work that I ever did there.

653 PLAYFAIR AULT was then called as a witness on the part of the defendant and testified as follows:

I was present on the 14th inst. at the uncovering of the Bobtail shaft. Mr. Rigby and Judge Clagett were there. I made a measurement of the amount excavated there, and I found it to be about 150 yards altogether, loose and solid rock work. I made a diagram of the work, which I have here in court. Total length of the work is about 65 feet to the south side of the Clara No. 2 shaft, where Mahan told me the old excavation was. No one assisted me in the survey. Mr. Rigby was there, but these measurements on this diagram I made on the ground. I made measurements there with Mr. Rigby, and afterwards measured it alone. There is no material difference in the measurements. Mine makes the Bobtail discovery $\frac{4}{10}$ of a foot deeper. We took the slope of the hill as a basis in

measuring the shaft. The other way we took what was supposed to be the surface on each side and stre-ched a tape-line, and in
654 this way I got the angle of the slope above and below the work. By stretching the tape-line from the surface ground below to the surface ground above we made the Bobtail discovery shaft $\frac{4}{10}$ of a foot less depth than by taking the angle of the slope above and below.

Defendants now offered in evidence two diagrams of the Bobtail workings, which are hereto annexed as exhibits.

On cross-examination the witness further testified as follows:

I made the measurement alone two days after I was there in company with Mr. Rigby & Mr. Clagett. The 150 cubic yards is my estimate of the amount of rock removed from the north side of the Clara shaft, from the red line north on that diagram. Mr. Romans, Thos. Mahan, and John Noonan were there. The Bobtail shaft itself, as it was exposed on that day, contained 12 cubic yards from the level at the top, as it is now, to the bottom. I saw no signs of blasting. I figured up the number of yards
655 in the Clara No. 2 cut at the level of the shaft, and I found that to be about 50 yards. It was 8 feet and something over at the back end—8 feet $\frac{63}{100}$.

On redirect examination the witness further testified:

The number of cubic feet excavated north of the Clara cut in the Bobtail workings would be 4,500. I went up to-day to the neighborhood of the Caledonia and measured some old works done there which was shown me by Mr. Cariso and Mr. Quinn as work which they did there on the Bobtail for Mr. Mahan, and the length of the work was 32 feet. Part of it had the appearance of having been a tunnel at one time. It was about 5 or 6 feet wide and about 15 feet deep at the back end. I took the direction from the east corner of the Caledonia and it is north 9° west. (Witness here pointed to the east side centre stake, and from this corner it is 185 feet north 9° west.) I have only followed practical engineering for about a year.

656 MAURICE CANFIELD was then called as a witness on the part of the defendant and testified as follows:

In February, 1877, I was living on Whitewood, below Elizabethtown, and on the last day of that month or the first of March I went over to Lead City by way of the trail up Shoemaker gulch. I know where the Bobtail discovery is, and I saw Thos. F. Mahan there at work on that day with pick and shovel. Nobody was there at work with him. I had no conversation with him and passed on.

On cross-examination the witness further testified as follows:

I heard about this case some time last spring, but I do not know now, nor did I know then, that the 28th of Feb. was an important thing in this case. I was up on the ground 3 or 4 days ago with a

man named Jones and a man named Moulton, where I saw Mahan working at the time I speak of.

657 Q. 7. Ever talk about the date you saw him working there before you went up?

A. No, sir.

Q. 8. Any talk about it afterwards?

A. I did not exactly know the date only in this way; Sam Parker, John King, and Charley Jones came in all from a hunt, and they say they got in to Lead City on the 1st of February—of March or second of March.

Q. 9. You fix the date on what they told you about the time they got back?

A. Yes, sir. I went up to Lead City the night—the day before they came in. I never had any talk about the date before I went up there with these men. He was running a cut, and I do not think there was a shaft there at all at that time. I do not remember whether the ground was frozen at the time or not.

658 JOSEPH HAYES was next called as a witness on the part of the defendant and testified as follows:

In Feb. & March, '77, I was keeping saloon down here in Deadwood and I knew Robert Curlin, one of the Caledonia owners, for the last ten or twelve years. I do not remember any occurrence that could fix the time when Curlin was at my saloon, and cannot tell where he was about the 4th of March, '77. He might have been in the saloon or he might be above. He used to come down & tell me they were working upon the Caledonia. He was about my saloon in those days and would be down here once or twice a week, and maybe would be down on Sundays; he would get tight once in awhile and stay tight two or three days. I do not know whether he was down here the last of Feb. or the first of March or any day. He might have been; I cannot tell. I paid for his meals at Cu. Iba's once in awhile, and paid his board for a number of days about that time. Iba kept a restaurant above me on Main street. He

659 might be on a prolonged spree in the latter part of Feb. or the forepart of March, but I have no recollection of it; but I cannot fix any date. The whole of them Caledonia fellows use-to get on a spree every once in awhile, and Curlin as much as any of them.

On cross-examination the witness further testified as follows:

Those Caledonia boys were pretty good workers, and they were on the work when they were sober; they would come down once and awhile and have a little spree.

660 Defendant here introduced and offered in evidence section 7 of the mining rules and regulations of the Whitewood quartz mining district, which read as follows:

In order to hold a possessory right to a claim there shall be not less than $100 worth of work done thereon during each year, and in

performing such labor 500 cubic feet in picking ground and 125 cubic feet in blasting rock shall be estimated at $100.00. Carried.

Defendant rests.

(Here follow diagams marked pp. 661 & 662.)

663 TERRITORY OF DAKOTA, *County of Lawrence:*

In [the] District Court, First Judicial District.

CALEDONIA GOLD MINING CO.
vs.
JOHN NOONAN. } N-. 121.

Bill of Exceptions.

Filed December 3d, 1881.

FRANK J. WASHABAUGH, *Clerk.*

Filed this 27th day of July, A. D. 1882.

B. S. WILLIAMS, *Clerk.*

Plaintiff's Rebutting Testimony, Book 4.

664 The plaintiff, to further maintain the issues on its part, then introduced in rebuttal HENRY C. ROHLEDER, who testified as follows:

I am a civil and mining engineer and a deputy United States mineral surveyor, and have followed the profession for nearly 30 years. I made the map now before me, purporting to show the location of the Gold Run lode, and the Bobtail as an extension of the same—600 feet in width—and the Bobtail as now claimed, and the Caledonia. I made this map from data derived from the official surveys and plats in the land office and from ~~corrections~~ on the ground. The Clara No. 1 I surveyed myself, and the Caledonia lode I surveyed, and the Grand Prize and the Queen of the Hills—the Clara No. 2 and the Bobtail from official surveys and plats in the land office. The point marked Incline and the Oro Fino Tunnel and the point marked Queen of the Hills shaft are all located on that map from actual surveys on the ground—so with the point marked New Bobtail shaft, Grand Prize tun-

665 nel, Clara No. 2 shaft are all located from actual surveys. The diagram on that map presented in blue color is from an actual survey on the ground and pointed out to me by Mr. Chizum—Daniel G. Chizum, I believe it is—on April 6th, 1880. Judge Murphy and John Dawson were present, besides the men who ~~claimed~~, and the point marked stump at the south end of the blue diagram denotes a stump which was pointed out to me by Mr. Chizum as the centre stake or near the centre stake of the south end line of the Bobtail as he located it, and the point marked "peg" is the original northeast corner of Gold Run lode, where I found a little peg standing, and he thought that that was in the neighborhood of the north-

east corner of the Gold Run lode as he located it, and the blue lines running around the exterior of this blue diagram represent the outlines of the claim as located, 600 feet wide. The deep lines are 300 feet apart and the other 600 feet. The point marked stump, south of the Clara No. 2 discovery, represents the centre stake of the
666 south end lines of the Bobtail as officially surveyed, and what Mr. Chizum claimed was the stake where the discovery notice of the Bobtail was first posted. He pointed it out to me as the discovery stake of the Bobtail lode, and the one further south as the original south centre end stake, and the point in the centre of the blue diagram is a stump which he pointed out to me as the centre stake of the north end line of the Bobtail as he staked it out. Mr. Chizum went up there with me and looked around towards Gold Run to find the north centre stake of the Gold Run, so that he would be sure that he found it. There is a little flat there. There is a big stump standing on the Gold Run side of the divide. From that he started and he pointed out this stump here that is marked there on the map as the stump being near the south centre end line of the Gold Run. Then I ran my line from there to that discovery stump of the Bobtail, and that he knew right off that it was the stump. Then he went back over the divide and stood on that stump
667 and held a stake on it, and I run the line from the discovery stump to the centre stake of the north end line. We found the north end line by going around and finding some croppings in a little hole that Joe Ingoldsby had dug there, and which is marked on the map Ingoldsby shaft. Chizum pointed it out to me as a little hole that had been dug by Mr. Ingoldsby. There is nothing on that map that was not taken from my own personal surveys on the ground, or from official maps or surveys made by others. Mr. Chizum said that the peg that was driven in the ground there was in the neighborhood of the northeast corner, and this stump which is marked there as being in the neighborhood of the south centre end stake of the Bobtail and the point marked stump on the north end line that is what he pointed out to me as the centre stake on the north end line, and the stump near the Clara No. 2 workings is the discovery stake of the Bobtail. The dotted blue lines are designed where the Bobtail claim would be if it was 600 feet in width. In speaking of points witness pointed to and designated them as points on the map offered by pl't'ff.

Defendant's counsel objected to all of the witness' testimony in relation to what Mr. Chizum said & did on the occasion of his showing Mr. Rohleder certain objects on April 6th, 1880, in con-
668 nection with the Bobtail claim as being incompetent and improper.

The court said: I will allow this testimony to go in for the purpose of allowing this witness the basis and grounds upon which he made this diagram, and for no other purposes; to which ruling defendant, by his counsel, then and there excepted.

On cross-examination the witness further testified as follows:

The little peg was about 12 to 18 inches long above the ground. I cannot tell whether it was an old peg or a new peg, and Chizum told me that the northeast corner of the Gold Run was somewhere in that neighborhood. I understand by the term neighborhood, within 15 or 20 feet, or 5 or 10 or 15. That was the expression he used: "It was in that neighborhood." There was no stake there. The peg was about two inches in diameter—had no marks on it. He didn't show me any other pegs. He did not point out anything as the southest corner of the Bobtail
669 nor did he point*ed* out anything as the southwest corner of the Bobtail. He went over that way himself to look at the ground, but pointed out nothing. I went right to this peg and stood over it. I found no corners at the points I have represented on the blue diagram; did not measure them. I ran the centre line, and the balance is the result of my draughting. I found no posts—no stakes—at any of the corners. He could find nothing. He hunted around; looked over the ground to see if he could find any points. We were there a half a day perhaps. I understand map making. The north centre end stump of the Gold Run was a stump about 6 inches in diameter and 10 inches high, and was not marked in any way. He went towards the Gold Run discovery. There was a tall stump there. Then he went right to this stump. And I must state here Chizum said he was not positive that this stump was the centre stake of the south end line, but it was in the neighborhood of 5 or 10 or 15 feet from this stump. There are other stumps in
670 that neighborhood. I cannot tell whether they *bare* any resemblance to each other or not. I do not remember whether there was any particular mark about this stump. The stump on the north end was about 12 inches in diameter and about 2 feet high. It had no marks. There were other stumps in that locality. I cannot tell whether they looked alike. It is a dead pitch-pine stump. I understand by neighborhood to be within 50 feet. I do not know that I would call an object a 100 feet away in my neighborhood. It would depend on circumstances. A great big building 100 feet off I would say was in my neighborhood, but small objects would have to be at a less distance.

Plaintiff now offers in evidence the map about which the witness Rohleder has just been testifying, and which is marked Exhibit X, to which defendant's counsel objected on the ground that the same was incompetent and not proof so far as the blue diagram representing a Bobtail location 600 feet in width was *correct*, which objection was overruled by the court, and to which ruling defendant's counsel then & there excepted.

671 A. R. Z. DAWSON was next called as a witness on part of plaintiff and testified as follows:

The depositions of which that bundle there purports to be a copy I believe to have seen in my office at the time of the fire, Sept. 26, 1874. If they were there they were destroyed by the fire on that occasion.

Witness here refers to the depositions hereafter referred to and testified about in the depositions of W. R. Keithley.

672 Plaintiff here offered in evidence a deposition of W. R. Keithley, taken March 10th, 1880, before O. P. Stokes, notary public, at Deadwood, D. T., and which is in the words and figures following, to wit—to the introduction of which defendant, by his counsel, at the time objected on the ground that the same was incompetent, irrelevant, and immaterial, which objection was overruled by the court, and to which ruling defendant, by his counsel, then & there excepted, and said copy was then read in evidence:

673 *Deposition.*

In the District Court of the First Judicial District in and for Lawrence County, Dakota Territory.

CALEDONIA GOLD MINING COMPANY (Formerly Henry Lacke *et al.*), Plaintiff,

vs.

JOHN NOONAN, Defendant.

Depositions of witnesses produced and sworn on the part of the plaintiff in the above-entitled action, taken before me, Oliver P. Stokes, a notary public within and for said county and Territory, pursuant to the annexed notice, commencing March 10th, A. D. 1880, at 9½ o'clock a. m.

Present: W. H. Claggett, Esqr., of counsel for plaintiff, and J. S. Mullaly, Esq., of counsel for defendant.

W. R. KEITHLEY, a witness produced on the part of plaintiff, being by me first duly sworn, as hereinafter certified, answered as follows to the interrogatories propounded to him:

Direct examination:

Q. 1. What is your name, age, residence, and occupation?

A. W. R. Keithley; age, 49; lawyer by profession, and reside in Deadwood, D. T.

674 Q. 2. How long have you practiced your profession as attorney-at-law?

A. Twenty-four years.

Q. 3. How long have you resided in Deadwood, Lawrence county, D. T.?

A. Three years and seven months.

Q. 4. Do you contemplate leaving the Black Hills shortly?

A. I do.

Q. 5. I will ask you whether in the month of August and September, 1879, you had occasion to make any compared and examined copies of any original depositions then on file in the office of the clerk of the district court, first judicial district, in and for Lawrence county, D. T., in certain cases then pending in that court, entitled respectively Caledonia Gold Mining Company (formerly Henry Lacke *et al.*), plaintiff, *vs.* John Noonan, defendant, and Cal-

edonia Gold Mining Company (formerly James Delaney *et al.*,) plaintiff, *vs.* John Noonan, defendant, and the case of John Harrington *et al.*, plaintiffs, *vs.* John Noonan, defendant. If yea, you may state the circumstances under which you made such compared and examined copies.

675 A. I did; those months and year I was employed by John M. Murphy, acting for Caledonia company, to make copies of a number of depositions which had been taken and filed in the office of the district court in these several cases mentioned and to make compared copies of the same.

Q. 6. State whether any one assisted you in the making of such compared and examined copies; and, if so, state who it was.

A. There was; B. F. Crocker was employed to assist me in making such compared copies.

Q. 7. You may now state in detail the method pursued by yourself and B. F. Crocker in making, examining, and comparing those copies of depositions in the cases previously mentioned.

A. Well, we took the original depositions as filed, I copied a portion of them, Crocker copied a portion of them, and a young man who is now employed in the banking house of Stebbins, Mund and Post, whose name is, I think, McKinney, and, after having copied them, read them over once or twice, found them to be correct copies and certified to the same.

676 Q. 8. You may now describe the exact method pursued by yourself and Crocker in making the comparison—that is to say, who read from the originals and who marked the correspondence with the originals in the copies.

A. Sometimes I would read from the originals and sometimes Crocker would. After thus having read them and revised them, so as to make the copy compare with the original, and found them to be exact copies, we then appended a certificate to each of them certifying them to be correct copies.

Q. 9. You may now state whether, after reading once and marking the correspondence between the originals and the copies, you reversed the method of procedure by the person who first read the original following the copy, the person following the copy first in his turn reading the original and the other person following the copy.

Objected to as leading by counsel for defendant.

A. We did; we read them over twice, some as many as three times, I think, in order to ascertain distinctly that the copies was exactly in accordance with the originals, word for word and figure for figure.

677 Q. 10. In order to obviate the objection to the last preceeding interrogatory, I will ask you to state how many times the originals and copies were read by yourself & Mr. Crocker and the method adopted to secure accurate and exact copies of the originals.

A. I can answer that by saying some of them were read over from two to three times.

Q. 11. You may now state whether, after these copies were thus

compared by yourself and Mr. Crocker together, whether anything was done by either of you alone; if so, which one of you, to still furthur verify the correctness of the copies, and if yea, you may state what was so done.

A. We appended our certificate, signing our names that it was an exact copy of the original, which certificate appears at the end of each copy. I have gone over them two or three times alone comparing them with the originals.

Q. 12. You may now state whether, in making these copies, any words written at length were abbreviated, or whether words
678 written at lenght in the originals were written at length in the copies and the abbreviations in the originals were copied as such abbreviations.

A. The copies were made word for word and figure for figure, and there was no abbreviations made, except where they were in the originals.

Q. 13. Will you state as beyond all questions that the copies made and compared by yourself and Crocker were accurate and exact copies of the originals?

A. They were.

Q. 14. Would you recognize these copies if shown to you now?

A. I would.

Plaintiff's counsel here hands witness a paper purporting to be a copy of the deposition of Daniel G. Chisholm in the case of the Caledonia Gold Mining Company (formerly Henry Lacke *et al.*), plaintiff, *vs.* John Noonan, defendant; also paper purporting to be a copy of the deposition of Francis Coyle, case of Henry Lacke *et al.*, plaintiff, *vs.* John Noonan, defendant; also paper purporting to be copies of the depositions of W. H. Workman, John Manning, and Peter A. Gushurst in the case last above mentioned; also a paper purporting to be copies of the depositions of Michael Lynch, Michael
679 Heffron, and Henry Lacke in the case entitled the Caledonia Gold Mining Company (formerly Henry Lacke *et al.*), plaintiff, *vs.* John Noonan, defendant; also a paper purporting to be a copy of the deposition of James Reynolds in the last above-entitled action; also a paper purporting to be copies of the depositions of John W. Dawson, Robert Cooper, James Dulaney, Nicholas L. Martin, Peter Sharlin, Walter H. Hall in the case entitled Henry Lacke *et al.*, plaintiff, *vs.* John Noonan, defendant; also a paper purporting to be copies of the depositions of William Gunn and Matthew Moore in the case entitled James Dulaney *et al.*, plaintiffs, *vs.* John Noonan, defendant; also a paper purporting to be copies of the depositions of John S. Goddard, Thomas E. Carey, and Michael Heffron in the case entitled James Harrington *et al.*, plaintiffs, *vs.* John Noonan, defendant, for his inspection and examination.

Witness having inspected and examined the papers above mentioned is asked by plaintiff's counsel—

Q. 15. You may now state whether the papers which have just been handed you are the copies of the original depositions

680 heretofore testified to by you as having been made, examined, and compared by yourself and B. F. Crocker in August and September, 1879?

A. They are, with the exception that this man McKinney made some of the copies which we compared—Crocker and myself.

Q. 16. Did you and B. F. Crocker compare each and all of the papers handed you?

A. We did.

Q. 17. You may now state whether these papers are in all respects in the same condition now as when compared by yourself and Crocker in August and September, 1879?

A. They are untarnished.

Plaintiff's counsel here hands to the notary the paper purporting to be a copy of the deposition of Daniel G. Chisholm and asks the notary to mark the same as Exhibit "A" and write his name thereunder for the purpose of identification; also the copy of the deposition of Francis Coyle, to be marked Exhibit "B," and identified as aforesaid; also the copies of the depositions of W. H.
681 Workman, John Manning, and Peter A. Gushurst, to be marked Exhibit "C" and identified as aforesaid; also the copies of the depositions of Michael Lynch, Michael Heffron, and Henry Lackey, to be marked Exhibit "D" and identified as aforesaid; also the copy of the depositions of James Reynolds, to be marked Exhibit "E" and identified as aforesaid; also the copy of the depositions of John W. Dawson, Peter Cooper, James Delaney, Nicholas L. Marten, Peter Sharlin, and Walter H. Hall, to be marked Exhibit "F" and identified as aforesaid; also the copies of the depositions of William Gunn [and] Mathew Moore, to be marked Exhibit "G" and identified as aforesaid; also the copies of the depositions of John S. Goddard, Thomas E. Carey, and Michael Heffron, to be marked Exhibit "H" and identified as aforesaid, the same being the papers just handed to the witness and identified by him, and asks the notary to attach the same to the deposition of said witness as a part thereof.

Defendant's counsel here objects to introducing in evidence *of* the papers above mentioned as incompetent, irrelevant, and immaterial.

The taking of deposition- hereupon adjourned until 2 p. m.

682 MARCH 10TH, 1880—2 p. m.

The taking of depositions proceeded with.

Present: W. H. Claggett, of counsel for plaintiff, and J. S Mullaly, of counsel for defendant; whereupon defendant's counsel waives all cross-examination, and the deposition of the witness [is] closed.

WILLIAM R. KEITHLEY.

Subscribed and sworn to before me this 10th day of March, A. D. 1880.

[SEAL.] OLIVER P. STOKES,
Notary Public.

The taking of the depositions thereupon adjourned until to-morrow morning, March the 11th, A. D. 1880, at 9½ a. m.

OLIVER P. STOKES,
Notary Public.

MARCH 11TH, A. D., 1880—9½ a. m.

By consent of counsel the taking of *of* depositions adjourned until to-morrow morning, March 12th, A. D. 1880, at 10 a. m.

OLIVER P. STOKES,
Notary Public.

683 Plaintiff then introduced a deposition of W. R. Keithley, taken before O. P. Stokes, notary public, at Deadwood, D. T., March 13th, 1880, and which was in the words and figures following, to wit: To the introduction of which as evidence defendant, by his counsel, then and there objected as incompetent, irrelevant, & immaterial; which objection was overruled by the court, and to which ruling counsel for defendant excepted.

684 *Depositions.*

In the District Court of the First Judicial District in and for Lawrence County, Dakota Territory.

CALEDONIA GOLD MINING COMPANY, (Formerly Henry Lacke *et al.*), Plaintiff,

vs.

JOHN NOONAN, Defendant.

Depositions of witnesses produced and sworn on the part of the plaintiff in the above-entitled action, taken before me, Oliver P. Stokes, a notary public within and for said county and Territory, pursuant to the annexed notice.

MARCH 13, 1880—10 a. m.

The proceedings of depositions continued.

Present: W. H. Claggett, Esq., of counsel for plaintiff, and J. S. Mullaly, Esq., of counsel for defendant.

WILLIAM R. KEITHLEY, a witness produced and sworn on the part of the plaintiff, being by me first duly sworn, as hereinafter certified, answered as follows to the interrogatories propounded to him:

Q. 1. In the direct examination of your deposition taken
685 on March 10th, 1880, before O. P. Stokes, notary public for Lawrence county, D. T., you testified in substance that certain papers attached to that deposition, and marked, respectively, "A," "B," "C," "D," "E," "F," "G," and "H," were accurate- examined copies of the original depositions which they purport to be copies of, and which were compared with the originals by yourself and B. F. Crocker in August or September, 1879. I will now ask you to examine Exhibit "A" of those exhibits and state by whom such exhibit was compared.

A. The deposition of Daniel G. Chisholm was compared by myself and John M. Murphy; the one marked as Exhibit "A."

Q. 2. You may now state how you came to testify that all of these exhibits were compared with the originals by yourself and B. F. Crocker.

A. The reason because I did not see it in the lot that was handed me for examination.

Q. 3. You may now state whether your testimony as to the manner and care with which you and B. F. Crocker compared Exhibits "B," "C," "D," "E," "F," "G," and "H" with the originals

686 is applicable to Exhibit "A" compared by yourself and John M. Murphy.

A. We did.

Q. 4. I- Exhibit "A" compared by yourself and John M. Murphy an accurate and exact copy of the original deposition of Daniel G. Chisholm?

A. It is.

Q. 5. You may now state whether all of these exhibits from "A" to "H," both inclusive, are not correct copies of the originals, including all of the bad spelling, crossed-out words, &c., precisely as the same appeared in the originals.

A. Yes; we copied them exactly as they were in the originals.

Cross-examination:

Q. 1. Mr. Keithley, have those exhibits from "A" to "H," inclusive, been in your custody since you copied and compared them with the originals in August and September, 1879?

A. No, they have not.

Q. 2. How do you know that they are now in the same con-

687 dition they were when you made and compared them with the originals in August and September, 1879?

A. Well, I judge them by their general appearance, by my name being appended to them, and by various other evidences. I had them in my custody a good while.

Q. 3. How long did you have them in your custody?

A. I had them in my custody bordering on two months, examining them more or less about every day for that time, except there might have been a day or two intermission.

Q. 4. Was not that the time—two months—consumed in copying and comparing with the originals?

A. It was.

Q. 5. Are you prepared to swear now that those exhibits are at the present time perfect and accurate copies of the originals?

A. I am when I know a fact. I never swear on information and belief.

688 Q. 6. What examination have you subjected these exhibits to, so that you could swear so positively *as* they are at the present moment accurate and perfect copies of the originals?

A. Having compared them with the originals, recognizing the exhibits by marks and handwriting—general appearance of the deposition—that is the copy as I found it. They are exact copies

of the originals, as filed with the clerk of the district court of the first judicial district.

Q. 7. When did you last compare them with the originals?

A. That was in August and September, 1879.

Q. 8. Did you, immediately before giving these depositions, examine these exhibits line by line and page by page, so as to see that no alterations, whether as to interlineations or excisions, were made in them since you copied and compared them with the originals, in August and September, 1879?

A. I did not, line by line, word for word, but examined them by having them turned over leaf for leaf and examining them generally in that way, and found them to be correct copies of
689 the originals, no interlineation appearing to attract my attention. If there had been I should have detected them.

Q. 9. Where, when, and how long did this examination take?

A. It may have taken an hour or two; I saw them first at Mr. Claggett's office, and then here afterwards.

Q. 10. When was that?

A. It was when I gave that deposition—the 10th, I believe.

Q. 11. What time did you get to Mr. Claggett's office on the morning of the 10th?

A. Saw them at Claggett's office first on the morning of the 10th; examined them cursorily at his office; saw them afterwards at the office of O. P. Stokes, notary; examined them generally again and found them to be copies of the same without any alterations.

Redirect examination:

Q. 1. You say while you were copying and comparing these exhibits they remained in your possession in the neighborhood
690 of two months; you may now state to whom you delivered them when you had completed their examination and comparison with the originals.

A. I delivered them to John M. Murphy.

Q. 2. How soon after their comparison with the originals was completed did you so deliver them?

A. Right off.

W. R. KEITHLEY.

Subscribed and sworn to before me this 13th day of March, A. D. 1880.

[SEAL.] OLIVER P. STOKES,
Notary Public.

The further taking of depositions is hereby adjourned by consent of counsel to be resumed at any time.

OLIVER P. STOKES,
Notary Public.

MARCH 26TH, 1880.

The further taking of depositions is hereby adjourned *sine die*.

OLIVER P. STOKES,
Notary Public.

691 TERRITORY OF DAKOTA, *County of Lawrence:*

I, Oliver P. Stokes, a notary public in and for the county and Territory aforesaid, do hereby certify that the foregoing depositions of William R. Keithley and Benjamin F. Crocker, on part of plaintiff, were taken before me pursuant to the annexed notice; that said witnesses were duly sworn to testify the truth, the whole truth, and nothing but the truth; that said depositions were taken at the time and place specified; that the testimony of said witnesses was severally reduced *reduced* to writing by me in their presence, and was by them subscribed and sworn to in my presence; and I further certify that I am not an attorney for either party or relative of either party, and that I have not any interest in the aforesaid suit.

In witness whereof I have hereunto subscribed my name and affixed my seal of office this 26th day of March, A. D. 1880.

[SEAL.] OLIVER P. STOKES,
Notary Public.

692 J. M. MURPHY sworn.

Before the COURT: You have heard the deposition of Keithley read?

A. Yes, sir.

By same: Did you assist in comparing the depositions with the original depositions?

A. Yes, sir.

By same: What do you say as to this being a true, full, and complete copy of the original deposition?

A. It is.

Cross-examination by Mr. MCLAUGHLIN:

Q. 1. Pleas[illegible] state how that copy of the deposition of D. G. Chizum was taken.

A. They were taken in my office.

Q. 2. How?

A. They were written. I think the original was on the table and McKinney —. I do not know whether Mr. Crocker or Mr. HcKinney were copying from the original; they copied them, and after they were copied they were read over and compared.

Q. 3. By whom?

[A.] This particular copy was read over by myself, but the most of the other copies were read over by Mr. Crocker and Mr. ——. The copy was read by myself, and Mr. Keithley had —. The original was read by myself and Mr. Keithley had a copy.

Q. 4. You read the original?

A. I read the original.

693 Q. 5. You are satisfied you read the original correct?

A. I did, sir.

Q. 6. Didn't you make any mistake in it?

A. No, sir; I would not say they were reversed back on that occasion. I would not swear to that, because I really do not remember whether they were.

Q. 7. Who had the copy when you was reading the original?

A. Mr. Keithley had the copy.

Q. 8. What was he doing with the copy?

A. I was reading the original and Mr. Keithley was comparing it with my reading.

Q. 9. As you read the original?

A. Yes, sir; I think I had the original, or I had the copy. I would not swear positive.

Q. 10. Did you copy the depositions entire?

A. Yes, sir; we copied all there was—all that we got from the clerk.

Q. 11. The notice upon which they were taken and the certificate of the clerk before whom they were taken?

A. Everything that was in the deposition that came from the clerk'- office.

Q. 12. The date filed?

A. I would not say; I think so. I think the date filed was on the back of the deposition.

Q. 13. What do you say about this particular deposition of Mr. Chizum; did you copy the notice under which it was taken—the clerk's certificate and the date of its reception & filing?

694 A. I am satisfied we copied everything that was connected with the original as handed to me by the clerk.

Q. 14. How did it happen you had the original?

A. Because I came & took it & left my receipt with Mr. Dawson.

Q. 15. Then the copies were not made in the clerk'- office, but in your office?

A. They were made in my office.

Q. 16. Whose handwriting was that copy made in?

A. I do not know, but I wrote some of it myself and Mr. Keithley wrote some.

Q. 17. What is your recollection about it?

A. If you would let me see it I will let you know. I cannot remember whether I wrote any of it or not. I did some considerable writing in those copies myself. Mr. Crocker would be off and I would write some.

Q. 18. How many of those depositions did you copy at that time?

A. I could not say, sir; I copied quite a large number.

Re-examination by Mr. CLAGGETT:

Q. 1. Examine that deposition of D. P. Chizum and state whose handwriting it is in (handing to witness deposition).

A. It is mine.

695 Q. 2. I understand you to say that after the copy was made Mr. Keithley took the copy and you read from the original?

A. I would not swear I read from the original or Mr. Keithley read from it positively; my impression is that I read from the original.

Q. 3. Is this the certificate—William R. Keithley and John M. Murphy—that you attached to it at that time?

A. Yes, sir.

Q. 4. Where did that deposition remain after it was taken by Mr. Keithley and compared?

A. It was taken over to your office and afterwards, at the time of the fire, we took it up to your house, rather.

Q. 5. Who took it over to our office?

A. I did.

Q. 6. Who assisted in carrying it to my house?

A. I did.

Q. 7. Along with other papers?

A. Yes, sir.

Q. 8. Did not you see it frequently between the time of the fire and the time of its perpetuation?

A. I did, sir; I examined the papers a few days after the fire to see what we had saved, and these depositions were among the number.

Recross-examination:

696 Q. 1. Where have these copies been since you and Mr. K-ithley prepared them?

A. They have been up at Mr. Claggett's private dwelling.

Q. 2. Do you know they were sent to the city of San Francisco?

A. No, sir; not to my knowledge.

Q. 3. Have you as an attorney any knowledge of that fact? And remained there until after the fire?

A. I never sent them down to my knowledge—neither the copy nor the original.

Q. 4. Are you satisfied they remained here?

A. Yes, sir; they were at Mr. Claggett's; I seen them repeatedly

697 Plaintiff next offered in evidence what purported to be a copy of a deposition of Daniel G. Chizum taken before J. J. Keithzler, at Glasgow, Jefferson county, State of Iowa, April 17, 1879, and which was in the words and figures following, to wit—to which purported copy defendant, by his counsel, objected on the ground that the same was incompetent, immaterial, and irrelevant, which objection was overruled by the court, and to which ruling the defendant, by his counsel, then and there excepted, and said purported copy of witness Chizum's deposition was then read in evidence:

698 The deposition of D. G. Chizum, witness, taken at Glasgow, in the county of Jefferson and State of Iowa, before J. J. Keitzler, a notary public for said county and State, this 17th day of April, 1879, in pursuance of a notice hereto annexed to be read in evidence in a suit pending now before the district court, first judicial district, Territory of Dakota, wherein The Caledonia Gold Mining Company, formerly John Lackey, is plaintiff and John Noonan defendant.

D. G. CHIZUM, being first duly sworn, deposeth, answers, and says as follows, to wit:

Int. 1st. State your name, age, occupation, and place of residence.

Ans. Daniel G. Chizum; sixty-four on the night [of the] 22d day of October; farmer, near Glasgow, county Jefferson, Iowa.

Int. 2d. How long have you been in Jefferson county, Iowa?

Ans. My home has been in Jefferson county about thirty-eight (38) years. My family has been here all that time, although for about twelf years of that time I have been in the mountains.

699 Int. 3. What part of the time was you in the mountains and where was you, in what State or Territory?

Ans. 3. In 1850 I went to California and returned in 1852. I went to Montana in 1864. I came here from Montana in 1869 and returned to Montana in 1872. I went from Montana in 1875 to the Black Hills, and came from the Black Hills in 1876, went to the Big Horn in 1877 prospecting, and returned home in July the same year.

Int. 4. When you returned home the last time in 1876, state if you bought property after your return; if yea, when, what kind of property you bought, and where have you lived since your return at that time?

Ans. 4. I came home about Sept., 1876, and bought property during the following winter. I bought a farm adjoining the town of Glasgow, on the north, containing two hundred and one ½ acres. I lived on the farm since I bought the same with the exception of the time when I went to Big Horn, but my family has lived on the farm since I bought it.

700 Int. 5. State of what your family consisted at the time of your return in 1876 and since.

Ans. 5. At the time of my return my famil*er* consisted of my wife, myself, and two children—one daughter and one son. My daughter has since married, and my son went to Kansas, and at the present time my famil*er* consist*ed* only of my wife and myself.

Int. 6. Have you other children beside the two mentioned; if so, where do they live?

Ans. 6. I have four sons and one daughter besides the two children mentioned; three of my sons reside in this county and are all married; the other son, to my best knowledge, is in Dakota in the Black Hills; the daughter has lived in this county till last Monday, when she left for Kansas.

Int. 7. How many of your children did live in this county at your return in 1876?

Ans. 7. On my return home in 1876 I had five children living in this county.

Int. 8. What did you pay for the farm you bought adjoining Glasgow?

701 Ans. 8. I paid $1,000 in gold coin for the farm.

Int. 9. You have stated you went from Montana to the Black Hills in 1875; where did you live in the Black Hills?

Answ. 9. I located and lived in Deadwood gulch on No. 5, below Discovery, about one mile and ½ from Deadwood city, and perhaps more.

Int. 10. What time in 1875 did you go there, and where did you live?

Q. 4. Where did that deposition remain after it was taken by Mr. Keithley and compared?

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Answ. 9. I located and lived in Deadwood gulch on No. 5, below Discovery, about one mile and ½ from Deadwood city, and perhaps more.

Int. 10. What time in 1875 did you go there, and where did you live?

Ans. 10. The exact time when I went there I am not able to tell, but to my best recollection it must have been in the early part of December, 1875. I think I left about the month of September, 1876, about the 9th.

Int. 11. For what purpose did you go to the Black Hills, and what business did you follow when there?

Ans. 11. I went to the Black Hills for the purpose of prospecting and mining, and the principal business followed was placer mining.

Int. 12. State the various claims in which you were an
702 owner while in the Black Hills, and where the same were located, and whether a placer or quartz.

Ans. 12. I had an interest in No-. 4 & 5, below Discovery, on Deadwood gulch; also an interest in a claim on Whitewood. The number of said claim I do not recollect. I owned No. 6 on Gold Run, in the Gold Run district. They are placer claims. I owned ⅓ interest in a quartz lode, called Gold Run, situated on the side of the hill; also ⅓ interest in the Bobtail, situated on the ridge at the head of what was afterwards called Shoemaker gulch; also a quartz claim.

Int. 13. What claim or claims was you working last before leaving the Black Hills in 1876?

Ans. 13. I was working on claim No-. 4 & 5, below Discovery, on Deadwood gulch.

Int. 14. By whom was the Bobtail located, and when?

Ans. 14. The Bobtail was located by Thomas Carey and Ireton and myself in 1876, between the 15th and the last day of February.

703 Int. 15. What part, if any, did you take in its location; who, if any one, acted with you in locating it, and what did you yourself do in the location? Give all the particulars.

Answ. 15. I assisted in the location of digging to find quartz in its place. I also assisted in staking the boundaries and writing the notice with a lead pencil on the stakes; also builded the mound of stones around the S. E. corner or end stake. Ireton and Carey acted with me.

Int. 16. How many days' work in all did you do on the Bobtail claim? Describe particular what you did on each day that you worked and the number of hours that you actually worked on each day.

Ans. 16. The whole time that I worked was, to my recollection, about two ⅓ of a days. The first day I worked early and late, and called it 1⅓ of a day; that day we were digging and locating. The next day I worked on the lead. Ireton hired a man and sended him up to work in his place. On that day I was digging in the lead with pick and shovel. As to the number of hours, I cannot say how many they were, as we had no time-piece.

704 Int. 17. How long after the first day's work was the second day you speak of as working on the Bobtail?

Ans. 17. The number of days between the first day's and the second day's work I do not recollect, but think the second day was in March or April.

Int. 18. When you left the Hills what did you do with your several interests there; to whom, if to any one, did you sell them?

Answ. 18. I sold all my interests, with the exception of my interest in the Bobtail claim. The placer interest in the Gold Run district I sold to a man who was a stranger to me in a few days after I had recorded it. The two placer claims in Deadwood Gulch, No. 4 & 5, I sold to Robert Neill. The one in Cape Horn district I sold to a man by the name of Spiegel. My interest in the Gold Run quartz lead I sold to a young man who was killed by the Indians.

Int. 19. When you sold your other interest there did you try to sell your interest in the Bobtail; and, if not, why not?

705 Ans. 19. The reason I did not sell my interest in the Bobtail claim was because I had no bid at that time; buyers were very scarce; everybody was hunting something for himself. I did not go around to hunt for buyers.

Int. 20. State whether or not you left your interest in the Bobtail in charge of any one when you left the Hills; if so, with whom?

Ans. 20. I did not leave my interest in anybody's charge or care. I did not see either of the parties owning a- interest in the claim for some time before I left the Hills.

Int. 21. State whether or not you verbally authorized Henry S. Ireton to sell or make such disposition as he chose of your interest in the Bobtail claim.

Ans. 21. I never authorized H. S. Ireton—verbal or written—to sell any interest I had in the Bobtail claim. The disposition- made with Ireton are as follows: In the spring—I think about the month of May—Ireton came to me, while I was working on No. 5, and he said to me some parties proposed to do a certain amount of

706 work on the lead for an interest in the same, provided I was willing. I told Ireton that my arrangement in regard to that — what he would make I would be satisfied with. This is all the arrangements I ever had with him.

Int. 22. Was any disposition made in pursuance of that arrangement between Ireton and yourself of any of your interest in the Bobtail?

Ans. 22. There was not.

Int. 23. What work have you ever have done on the Bobtail since you left the Black Hills?

Ans. 23. I have had none. At least, I never contracted to have any done.

Int. 24. To whom, if any one, in the Black Hills, did you ever write to look after your interest in the Bobtail or do any work there?

Ans. 24. To no one.

Int. 25. State when, if at all, you sold your interest in the Bobtail, and to whom.

Ans. 25. I sold my interest in the Bobtail Oct. 14, 1878, to a man who called himself Mahan. I do not remember his first name.

707 Int. 26. State if you had ever seen or known Mahan before the 14 day of October, 1878.

Ans. 26. I never saw the man to my personal knowledge until he came to my house that day and gave his name.

Int. 27. What did he pay you for your interest in the Bobtail?

Ans. 27. He paid me twenty-five dollars.

Int. 28. Where was Mahan at the time he purchased your interest? State what he said to you as an inducement to the purchase, how he came to be in town to see you on the subject, and all the circumstances and particulars of what transpired between you on the subject of that purchase.

Ans. 28. He was at my house when we made the agreement. He said that he bought Carrie's and Ireton's interest in the Bobtail, and had given Ireton twenty-five dollars. He also said that Ireton told him that I authorized him to sell my interest in the lead, and he, Ireton, would send me half of the money that he received—that is, the twenty-five dollars. He also asked me if I had given Ireton any authority to sell my interest, and if I had received any money
708 from Ireton or heard from him. I told him I had not heard from him or received any money, and I told him that I never gave Ireton any authority to sell my interest. He, Mahan, told me that he was on his way to see his friends in New York, and he thought he would call and see me in regard to the purchase in the lead.

Int. 29. State if before your sale to Mahan you had ever received any letter or letters from any one in the Black Hills, or elsewhere, referring to your interest in the Bobtail claim.

Ans. 29. I had not; but that evening, after I had sold to Mahan, I had a letter from my son referring to it, written from the Black Hills.

Int. 30. State if, in going to the Big Horn in 1877, as stated in your answer in int. 3, or returning from there, you was in the Black Hills country; and, if so, where was you; did you stop there any time, and how long did you stop there?

Ans. 30. I was in the Black Hills country when I went to the Big Horn, and slept on claim No. 4, below Discovery, on Dead-
709 wood gulch. As soon as I got my horses up the next morning I went to the valley to get grazing for my horses. I think I stayed there eight or ten days—ten or fifteen miles from Deadwood; then off for Big Horn.

Int. 31. Where you on the Bobtail lode at that time?

Ans. 31. I was not.

Int. 32. State whether not you ever prospected any of the material from the Bobtail discovery shaft; and, if so, how did you prospect; to what extent; how often, and what kind of prospect you obtained in gold.

Ans. 32. All the prospecting was with the naked eye at different times, and I would see gold in it.

Int. 33. Do you know, of your own knowledge, anything of any work being done on the Bobtail by Coleman and Rayburg under a contract?

Ans. 33. I do not of my personal knowledge; all the knowledge I have is through Ireton of this parties working. I passed by the

lead. There was work — by some one. Ireton informed me that this parties had done it, and I believe that his expression was they had thrown up the contract.

710 Int. 34. Did you ever inspected any work done by this party on the Bobtail? And state all you know with reference to such work, the value of it, how it was to be paid for, whether or not the consideration for it was ever given, and, if not, why not.

Ans. 34. I could not — considered — consideration, as I just noticed the work as I passed and passed on. I could not give it a valuation, not giving it a close inspection. All I can answer for paying for it is by reference to Ireton. If there was a consideration ever given I do not know it; my understanding from Ireton was, there was no consideration due for it, they having failed to fulfill the agreement.

Int. 35. How many days' work were done on the Bobtail to your personal knowledge prior to the time that you left the Black Hills, and what was the value of the work?

Ans. 35. To my personal knowledge the work that was done by Carey, Ireton, and myself was in all five days. I estimated our labor at $5 per day; if Carey was on the lead, except the first day, I do not rem[em]ber it.

711 Int. 36. State whether or not, before going to the Black Hills, you had been engaged in prospecting—in mining—in different localities; if so, where and how long in each.

Ans. 36. I was engaged in prospecting and mining while I remained in California; in Montana I was engaged in farming two summers; and the remainder of the time I was prospecting and mining.

Int. 37. State whether or not when you left the Black Hills you knew that the laws of the United States required one hundred dollars' worth of work to be done on each mining claim each year in order to hold it.

Ans. 37. I did not know that the laws of the United States required that, but I knew that the laws of Montana did. I supposed that it was regulated by Territory laws.

Int. 38. Describe the delivery hole or cut in the Bobtail as it was when the locators quit work on it in February, 1876; give it- length, width, and depth in detail.

Ans. 38. The cut was started on a path running across the ridge below the Bobtail lodes on the side of Shoemaker gulch; the

712 length of the cut I cannot precisely describe, as I never measured it at the lower end; it started at the surface, where it came to the top of the bed-rock, and went intersecting the quartz. I should think the upper end was four feet deep; then we sunk a shaft by the side of the lead down to the bottom of the cut. I think the length of the shaft was six feet, and the width I do not know if it was four feet or not.

Int. 39. State what was the material drawn out of the discovery hole for solidity, and state what kind of tools were used in sinking it—that is, if the tools were ordinary picks and shovels in ordinary repair and condition.

Ans. 39. Quartz and dirt were drawn out of the discovery hole—some solid pieces of quartz and some decomposed quartz; the tools used were ordinary picks and shovels in ordinary good repair.

Int. 40. When you sold all your interest in the Black Hills except the Bobtail and came to Iowa what were your intentions as to remaining in Iowa?

Ans. 40. My intentions were when I came to Iowa to buy
713 a large herd of cattle and return to the Black Hills, but I changed my mind and concluded to buy a farm and continue my home in Iowa.

DANIEL G. CHIZUM.

STATE OF IOWA, *Jefferson County:*

I, J. J. Keitzler, a notary public in and for said county and State, hereby certify that the witness, Daniel G. Chizum, whose name is subscribed to the foregoing deposition, was first sworn to testify the truth, the whole truth, and nothing but the truth; that his deposition above was reduced to writing by me; that the deposition was written and subscribed by the said D. G. Chizum in presence of said witness and of the undersigned; that the deposition was taken on the 17th day of April, 1879, in the office of the undersigned, and at the time and place mentioned in the notice hereto attached, at Glasgow, Jefferson county, Iowa.

In witness whereof I have hereunto set my hand and affixed my official seal this 17th day of April, 1879.

[NOTARIAL SEAL.] J. J. KEITZLER,
Notary Public.

714 Witness fees, D. G. Chizum $1.35; paid by plaintiff's attorneys; notary fees, $10; paid by plaintiff's attorneys.

TERRITORY OF DAKOTA, } *ss:*
County of Lawrence, }

This is to certify that we, the undersigned, have this 19th day of August, 1879, carefully compared the foregoing and annexed copy of the deposition of Daniel G. Chizum with the original deposition now on file in the office of the clerk of the district court of the first judicial district of said Territory, and that the same is true and correct as appears from said deposition on file.

W. R. KEITHLEY.
JOHN M. MURPHY.

715 Plaintiff next offered in evidence the deposition of D. S. CHIZUM, taken Jan. 10, 1880, at Glasgow, which is in the words and figures following, to wit:

I reside in Glasgow, Jefferson county, Iowa, and my present occupation is farming. I was first in the Black Hills in the month of December, 1875; left there in September, 1876, and again returned there about the first of May, 1877, but remained there only a few days. I helped to locate the Gold Run and the Bobtail mines. The Gold Run was discovered the day of the Gold Run excitement, in

the month of Feb., 1876, and the Bobtail a few days previous. My son, Theodore S. Chizum, and a man by the name of Haggard were interested with me in the location of the Gold Run, and Ireton & Carey were interested with me in the location of the Bobtail. The Gold Run lode was located on the south side of the ridge formed by the north fork of Gold Run gulch, measuring 750 feet from Discovery in the direction of the head of Shoemaker gulch—supposed to be a northwesterly course—to the southeast
716 end of the Bobtail lode, running, or supposed to run, in like direction, and the Bobtail continued in the same direction for 1,500 feet on the right-hand side of Shoemaker gulch going down the gulch—pretty well up on the slope. Prior to the location of the Gold Run and Bobtail claims I had been prospecting and mining between 11 & 12 years. When I located the Gold Run & Bobtail claims I was not familiar with the points of the compass. The Gold Run claim was located & staked 600 feet in width & 1,500 feet in length, measured by stepping. Haggard, Theo. S. Chizum, and myself did the staking and locating of Gold Run. We all done some digging on the claim, and each one assisted in the location. Haggard wrote some of the notices and I wrote the balance. I did some diggins part of two days. As we first staked it the northerly end of the Gold Run claim did not exceed 400 feet, and it might not have been more than 200 feet from the head of Shoemaker gulch. The discovery of the Bobtail was from 200 to 400 feet from the
717 northerly end line of the Gold Run, and the direction was supposed to be a northwesterly course. Whilst I was an owner in the Gold Run there was no change that I know of made in its exterior boundary stakes. I do not remember which of the locators at the Gold Run it was who recorded the location notice with the mining recorder. When the Bobtail claim was located it was not claimed, staked, and recorded as an extension of the Gold Run claim that I know of. It was 600 feet wide, measured by stepping. The Bobtail was staked by Ireton, Carey, and myself. I wrote the first notice with a lead pencil on a dead pine tree at the discovery hole, the second on the southeast end, and then we staked the centre side and end lines, writing the necessary notices on the stakes or trees. The side lines of the Bobtail as originally staked were a continuation of the side lines of the Golden Run, which we supposed to run in a northwesterly direction. The course of the Bobtail as originally staked continued in the same general direction as we staked the Gold Run.
718 As originally staked the Bobtail was supposed to be northwest and southeast. Prior to my leaving the Black Hills in September, 1876, no change had been made in the exterior boundary stakes of the Bobtail that I know of. The Bobtail was located a few days after locating the Gold Run. I sold the Gold Run early in the spring of 1876. I do not recollect the man's name I sold it to. He was afterwards killed by the Indians. What I received for it I consider my own private business. I received what I considered a just remuneration. The indication of the surface of the Gold Run showed [it] to be a greater value than the Bobtail. If a map was drawn as

we staked it I would recognize the general course and direction of the Bobtail claim with reference to the general course and direction of the Gold Run claim.

(Witness here examined map attached to his deposition made the day before in the case of the Caledonia Gold Mining Company, formerly James Delaney *et al.*, *vs.* John Noonan, marked Exhibit "A," and stated that it was not correct according to their staking, a copy of which map is hereto attached marked Exhibit "A.")

719 The south end of the Bobtail should come down against the north end of the Gold Run with equal width and continue in the same general course, including an angle near the ends of the lodes. In my testimony yesterday in the case of the Caledonia Gold Mining Company, formerly James Delaney *et al.*, *vs.* John Noonan, I indicated on Exhibit "B" the course and direction of the Gold Run & Bobtail claims respectively, according to the points of the compass and their relative positions to each other as we staked them at the time [of] their locations. The northerly end line of the Gold Run might be considered the southerly end line of the Bobtail. The northerly centre end stake of the Golden Run stood very close to the southerly centre end stake of the Bobtail; they were only a few feet apart. The northerly centre end stake of the Golden Run was between 200 & 400 feet from the Bobtail discovery shaft. The Bobtail discovery stake was a dead pine tree. It stood on the southeast end of the discovery shaft, from 6 to 10 feet distant, and stood on the middle line in a northwesterly
720 direction from the northerly centre end stake of the Gold Run, the middle line supposed to be on the lead. The southerly centre end stake of the Bobtail was a stub about 4 feet high—the kind of wood I cannot recollect; it was about 4 inches in diameter on the top, and had been somewhat burned. Ireton & Carey let me into the Bobtail after they had made the discovery and before it was located. I do not recollect who it was who took the Bobtail location notice to the recorder for record. I was last in the Black Hills in the spring or summer of 1877. I am sure I was not there in the latter part of that summer.

721 Plaintiff next offered in evidence the deposition of J. B. PEARSON, which is in the words and figures following, to wit:

I reside at Central City and am engaged in mining & milling. My deposition has already been taken in this case on the part of defendant. In that deposition I stated that I had made a location on the northeast end of the Bobtail in February, '76, as near as I can recollect. I completed the location, but never recorded it. I don't recollect the name of the location. We made two cuts, four feet wide, 4 feet deep, and 5 feet long. One of them is alongside of a big boulder. The work was done by me and Ingoldsby. I do not know where the Queen of the Hills discovery shaft is. I recently visited the place where we did the work, in company with John Dawson, and showed him where the discovery was. I put up a post about 6 feet from a big boulder in a northerly direction the

same day we made the location. The first name on it was John
B. Pearson, Joe Ingoldsby, William Gay, Dad Haggard,
722 and Dan. Murkles, besides myself & Ingoldsby; none of the
other locations would do any work on it, and that's the reason we abandoned it. I did not know in Feb., '76, where the northeast centre end stake of the Bobtail was, but did a short time after. They did not put up the northeast end stake then; the work by myself & Ingoldsby was done before the Bobtail was staked; I don't know when the Bobtail was staked; I think it was about two weeks after Ingoldsby & I worked there that I saw the northeast centre end stake; it might have been staked the day after we did the work. The north centre end stake of the Bobtail stood about 50 or 60 feet northeast from our work by the big boulder. Upon my recent visit there in company with John Dawson he pointed out to me the Queen of the Hills discovery shaft. I think it is about 100 feet east from the boulder to the discovery shaft of the Queen of the Hills. I did not measure the distance, but guessed at it. The other cut
which Ingoldsby & I made is where the Queen of the Hills
723 discovery shaft is now. The Queen of the Hills discovery is about 40 or 50 feet a little south of east from the northeast centre end of the Bobtail as I first saw it. I do not know how wide the Bobtail was staked.

On cross-examination the witness further testified as follows:

I think the cut at the big boulder was about 50 or 60 feet northeast of the north centre end stake of the Bobtail; the second cut was about 40 feet south of east from the north centre end stake of the Bobtail.

On redirect examination the witness further testified as follows:

I think that the north centre end stake of the Bobtail was about 50 or 60 feet distant from the big boulder and in about a northeast direction. The boulder was of dark red ore; it was still in the ground when I was there with Dawson recently; it stood about two
feet outside the surface of our cut; one of the cuts was on
724 its west side and the other on the south; I called that boulder from my experience in mining a solid ledge.

725 The deposition of DANIEL G. CHIZUM, taken at Deadwood, May 20, 1880, a witness on the part of plaintiff, was then offered in evidence, and is in the words and figures following:

I am now engaged in mining in Colorado. I came here at the instance of the Caledonia Company, and have been paid by it for doing so $1,000.00. I am the Daniel Chizum who was one of the locators of the Bobtail. About the 2d or 3d of April last I visited the Bobtail in company with Mr. Rigby, Jack Dawson, and my son, Squire C. Chizum, to show where the stakes had been set by myself and copartners in Feb., '76. The exact date of the month I cannot give, but it was between the 15th and 28th. I pointed out the south centre end stake, the discovery stake, the north centre end stake, the

southeast corner stake, and the stake on the west side, opposite the discovery stake. I want to explain what I meant by side stakes. The discovery stake I called the centre middle stake, and a stake was set on the west side and one on the east side, opposite the
726 discovery stake, which I called the side centre stake or stakes. The lead was located and bounded by nine stakes—3 on the sides and 3 on the end. The claim was staked 600 feet wide by steps measurement, calculating three feet to a step. In regard to the southeast corner stake Mr. Dawson said that he knew where that stake stood, and we went across the place and found old chips or hewings lying by the place where the stake should have stood. There was no stake or rock there. That was all that was said in regard to pointing out any places where the stake should have stood. I located the old position of the south centre end stake from my personal knowledge of the ground, and the stump had remained there, and from a black fire-mark that still remains on the stump. This stump was originally about 4 feet high. West of that stake or stump there was a small mound that had been thrown up near by on the day that I discovered the Gold Run and a stake stuck in the top 18 inches or 2 feet in length by a party that came to me when I was digging on the side of what [was] afterwards called the Chizum boulder. That mound was one mark that assisted me in pointing [out] the centre end stake, or where it stood. This mound was thrown up the same day, or one similar on the same place. The reason why I am so positive about this matter is the red cropping or quartz which was there, & still some of them remains west of the mound. The south centre end stake of the Bobtail stood about 30 or 40 feet east of the mound. On my visit there on April the 3d I discovered a tall dead pine tree, with the top broken
727 off, which I recognized, as I considered it on the centre line of the Gold Run lode. This tree would fall on the centre line, or near it, up to the discovery stake of the Bobtail; it could not be on the centre line drawn from the north centre end stake of the Bobtail because of the curve in that lode which takes place near the discovery stump. At the time of my visit I ascertained the original position of the Bobtail discovery stake from my knowledge of the ground and the croppings that stood up beside the tree; that has been cut down. I think the stump of the stake of the Bobtail pointed out by me was about 20 feet west of south of the original discovery hole; it may be more or less, as I never measured the distance. When I visited the ground, about April 3d, 1880, I fixed upon the original locality of the north centre end stake of the Bobtail from the body of quartz that was cropping out 2½ or 3 feet high, where Joseph Ingoldsby was digging on the west side
728 of it the day we located the Bobtail, a dead pine tree that stood some 40 or 50 feet north or northwest from where he was digging, the stump remaining there, which appears from size and standing the proper distance according to my recollection. I think to draw a straight centre line from the discovery stake, the stump referred to would be higher up on the side of the hill than the place where I saw Ingoldsby digging at the time when I located

the Bobtail. I fix these quartz croppings as being the place where I saw Ingoldsby digging in Feb., '76, from the color of the dirt, the color of the quartz, and from the distance it struck me when I stood down by the side of it, the depth being the same or near what it was in '76, when the lead was located. The day that he done this digging I stept down on the lower side of the quartz. The top of the quartz measured a little above my hips. The measurement being so nearly the same, the color of the dirt the same, the color of the quartz the same as it was on the day of the location, I am positive in this regard to my landmarks. I don't know of any other croppings near that place where Ingoldsby was digging that corresponded in the particulars of heighth and length, and C. The south centre end stake, according to the present points of the compass, according to information I have received in regard to the compass points, would be in a southerly direction from the Bobtail discovery tree; but the exact distance I am unable
729 to tell; I would suppose it to be, by the sight of the eye, 250 feet or more. In 3 or 4 days after April 3d I again visited the Bobtail in company with Dawson, Murphy, and a surveyor. I pointed out the stakes to the surveyor on April 3d. I was not one of the discover*ing*. On the day of the Gold Run excitement I went over to Gold Run gulch, and on my return home, on the trail that went up Shoemaker gulch to the head, I noticed some croppings and a dead pine tree which had been blazed and had a notice written on it with a lead pencil:

"We claim this lead," signed by Ireton & Carey. A day or so afterwards Ireton told me if I would help in the location I should have a third interest, which was agreed by Carey. We commenced working on the lower side, sinking a small shaft or hole up the path that runs up to Shoemaker gulch. We ran a narrow cut. The shaft on the lower side and the cut was the same depth when we reached the body of ore. The ore appeared to be covered up.
730 A portion of it on the upper side. We done some digging on the upper side to the amount of 18 inches or two feet; come down on to the body of ore, which, I was satisfied, was quartz in place, but I could not say that as yet we had a defined wall. We then stepped & staked the ground and wrote our notices on the stakes. Ireton hired a man to work on the lead. We extended this shaft 7 or 8 feet alongside the body of ore, and that is all the work that I or any of the locators that I have any knowledge of did upon the lead. The notice that Ireton and Carey put on the tree, according to my judgment, would be on the north side. After the ground was staked I put another notice on this tree, and, according to the best of my judgment, it was on its east side. I wrote the notice myself, naming the Bobtail lode; claimed 1,500 feet in length, commencing from the north end of the Gold Run lode and running, as I supposed, in a northwesterly course; also 600 feet in width, with all the dips, spurs, and angles, and signed my own name, Ireton-', and Carey-' to it. The tree on which I wrote that notice was
731 not a Gold Run stake; it was a Bobtail discovery stake or tree. When I posted this notice I supposed that the north

centre end stake lay in a northwesterly direction from the discovery stake. The inscription that we put on the south centre end stake was similar to the one on the discovery stake, except the name of the stake. I don't remember whether we marked the length of the lead and width on all the stakes or not. I took the lead in locating the Bobtail. The Gold Run was staked before the Bobtail was; the Bobtail had only one south centre end stake and one discovery stake; none of the bobtail locators ever planted a discovery stake close to their discovery cut to my knowledge. The ground in Feb. at the discovery was frozen, but not very deep. I think Ingoldsby had stuck a notice written with a lead pencil upon a tree near where I saw him at work. I don't remember what it claimed or of any name being signed to it but Ingoldsby's. I don't remember of any particular conversation with Ingoldsby, except telling him that he was on our ground and we were entitled to it by being the first discoverers.

732 On cross-examination the witness further testified as follows:

The proposition offering me $1,000.00 for testifying in this case on the part of plaintiff was made to me by Schleegel and Mr. Cracker, claiming to come from Mr. Claggett, the attorney for the Caledonia Company. It was paid to me by Mr. Rigby by draft on the 2nd of April. We staked the Bobtail in Feb., 1876, the first day after the discovery in Gold Run. The precise day of the month I don't recollect. The stakes were all put up the same day we wrote the location notice. I do not remember whether I wrote all the notices or not, but I do remember very clearly of writing the notice on the Disery dead pine tree as the discovery stake. I remember very distinctly of piling some rock around the southeast corner stakes. The south end centre stake was a stub of a small tree, I think, about 4 feet high. The discovery stake was a dead pine tree. The north end stake was a dead pine tree.

733 The west side stake opposite discovery stake was a green tree of the pine kind. I don't remember distinctly of any other trees, although there might have been others. The supposed distance by step measurement between the south centre end stake and the southeast corner end stake was 300 feet. I do not recollect whether Carey or Ireton stepped it; I did not. I do not remember of stepping any part of it. I think the stepping was done by Ireton or Carey, or both of them. All I know about the Bobtail claim being 600 feet in width is because I was with them when the stepping was done, and I supposed each pace was 3 feet. We claimed in the location notice 300 feet on each side from the centre of the vein. I was told by Ireton that that location notice was recorded. The stake on which I first saw the names, Ireton & Carey, was a dead pine tree, which we afterwards marked as a discovery stake. I do not remember the distance that it was from the south centre end stake, but I think, perhaps, 250 feet, more or less, in a north-

734 erly direction from what I considered at the head of Shoemaker gulch. It was stepped at the time of the location by

either Ireton or Carey, but I do not remember the number of steps or feet. The discovery stake was, I think, in a southerly direction, about 20 feet or more from the work I have described. I don't think that we claimed 1,500 feet northerly nor any particular portion southerly from the discovery stake. We claimed 1,500 feet, commencing at the north or northwest end of the Gold Run lode. I think I wrote the notice on the stub myself, but I am not so positive of writing that notice as I am of the notice written on the discovery tree. I think that Ireton & Carey, as well as I recollect, cut and prepared the made stakes. I do not remember whether the northwest corner stake was a stake, stump, or tree. From faint recollection the northeast corner was a broken-top tree, but I am not positive. To the best of my recollection the staking was all done in one day. My personal labor consisted of two days, one of which was the day of location. I also did some work digging
735 and shoveling on the upper side where we came down onto the quartz. Carey and Ireton worked in the cut and shaft on the day of location whilst I was digging on the upper side. Ireton set a man at work in his place and we both worked in the shaft and cut. I do not remember the number of days that intervened between the day of location and the day when Ireton sent up this man to work in his place. There had been no work done on the Bobtail to my personal knowledge between the day of location and my second day's work. It was possible that work may have been done. I heard of Coleman & Raborg doing work there in virtue of a contract entered into with — by the locators of the Bobtail; heard it from Ireton. I could not tell how often I passed over the Bobtail after my second day's work. I was generally in a hurry and gave it but little attention as I passed. I observed that there had been work done by some one and supposed it to have been done by the par-
736 ties to whom Ireton gave the contract. The work was digging, picking, and shoveling. It was not very far southwest of our discovery. I could not just tell the extent of it. There was quartz thrown out. A man could not dig near the body of ore without having more or less quartz mined with his digging. When I was up there last April with Rigby, Murphy, and Dawson, Dawson stated that he knew very well where the southeast corner stake was, as he had been there a number of times, and he described the quality of the stake, which suited the description precisely. He had reference to his visits in 1876. He also stated that he remembered the notice on the discovery tree and that it struck him that it read kind of odd. I inferred from the two stakes mentioned by him that he was acquainted with the location of the claim.

On redirect examination the witness further testified as follows:

737 Q. 1. You were asked in cross-interrogatory No. 1 the following question: "From whom did the proposition come offering you a thousand dollars for testifying in this case on the part of the plaintiff?" You will please state whether you understood that question when it was propounded to you as intimating that you had received anything for your evidence.

A. I did not understand it to mean that I had received anything or would receive anything for my evidence. My understanding was that it referred to the value of my time and labor and expenses coming to Deadwood, as that was the understanding with me when the proposition was made to know what I would take to come to Deadwood about the time that the court would be in session. This money was paid to me for my time & expenses of coming here by my accepting — proposition, which was made to me through
738 Schlager & Mr. Craken, attorneys-at-law. At the time that the Bobtail was located the ground at its discovery had never been broken with pick and shovel until Ireton, Carey, and myself broke it. I cannot tell how much time was respectively consumed in digging and staking the claim on the day of location. We continued digging until we were satisfied we had struck quartz in place; then we commenced staking, which occupied the remaining part of the day until it was quite dark. When the man whom Ireton sent to work there & I had quit work on the second day the hole was 7 or 8 feet long. I didn't measure it, but I should judge it was 4 feet wide and 3½ or 4 feet deep. The cut was started from the path or trail perhaps 10 or 12 feet below the hole. The cut intersected the lower side of the hole. When the hired man and I quit work there was no work on the ground other than this cut and the little hole on the upper side of the quartz. There were very strong indications of quartz being in place where the discovery
739 work was done. It did not show a well-defined mineral vein or lode, as I understand a mineral vein or lode to have one or more well-defined walls.

740 Witness was here handed by examining counsel for identification his deposition taken at Glasgow, Iowa, on the 9th of January, 1880, in the case of the Caledonia Gold Mining
741 Company (formerly James Delaney *et al.*) *vs.* John Noonan, and stated that he believed it was his deposition, because it had his signature.

In the deposition referred to I spoke of the Golden Run & Bobtail claims as running in a northwesterly direction. On my recert visit and from information I received from others the original staking appears to be southerly and northerly; that would be the direction of the centre line of the Bobtail, with the exception of the angle; but, as I said before, I do not know the points of the compass.

On recross-examination the witness further testified as follows:

I do not remember clearly the distance which I stated the discovery stump or tree was from the shaft in my first deposition, but, after coming here and looking over the ground, my supposition of the distance is 20 feet. It might possibly have been the case
742 that some remarks passed between Angus McMasters and me with reference to the Bobtail claim on the occasion of his visit, but I have no recollection of it. I believed there was quartz in place- there, but I could not say that I had a defined wall; and, as for prosecuting the work to find a defined wall, there was a doubt

in my mind, as quartz is sometimes found in large bodies and in places where there is no well-defined wall.

The following is a copy of the deposition identified by witness as the one which purported to be his deposition taken at Glasgow, Iowa, on the 9th of January, 1880, on the part of plaintiffs, in the case of the Caledonia Gold Mining Company (formerly James Delaney *et al.*) *vs.* John Noonan, and a copy of which was made by the notary, marked Exhibit "A," and made a part of the above deposition:

743 *Notice to Take Depositions.*

In [the] District Court, First Judicial District, in and for Lawrence County, D. T.

CALEDONIA GOLD MINING Co., Formerly James Delaney *et al.*, Pl'ff,

vs.

JOHN NOONAN, Def't.

TERRITORY OF DAKOTA, } *ss:*
County of Lawrence, }

To the defendant above named:

You will take notice that the plaintiff above named will proceed to take the deposition of Daniel G. Chizum, a witness for pl'ff, before J. J. Kritzley, a notary public, at Glasgow, in the county of Jefferson and State of Iowa, or other competent authority, on the ninth day of January, A. D. 1880, between the hours of 10 a. m. and 2 p. m. of that day; that the taking of that deposition will be continued and adjourned from day to day at the same place until fully taken and completed, and that the deposition so taken will be read in evidence upon the trial of the above-entitled action on the part of the plaintiff.

CLAGGETT & DIXON AND
JOHN M. MURPHY,
Att'ys for Pl'ff.

744 *Notice to Take Depositions.*

In the District Court, — County.

CALEDONIA GOLD MINING Co., Formerly James Delaney *et al.*, Pl'ff,

vs.

JOHN NOONAN.

Due service of this notice is hereby admitted this 29th day of December, A. D. 1879.

McLAUGHLIN & STEELE,
Attorneys for Def't.

745 TERRITORY OF DAKOTA, }
County of Lawrence, } *ss*:

In the District Court, First Judicial District, County of Lawrence.

CALEDONIA GOLD MINING COMPANY (Formerly James Delaney *et al.*), Plaintiff,

vs.

JOHN NOONAN, Defendant.

STATE OF IOWA, }
County of Jefferson, } *ss*:

Be it remembered that pursuant to a notice hereunto annexed, and on the 9th day of January, A. D. 1880, before me, J. J. Kritzler, notary public in and for the county of Jefferson, State of Iowa, duly appointed and commissioned to administer oaths, personally appeared Daniel G. Chizum, a witness produced on the part of the above-named plaintiff in the above-entitled action, now pending in the said court, who, being by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, was there and
746 then interrogated [and] examined by Jas. McCracken, counsel for the said plaintiff. No appearance for defendant.

Interrogatory.

Q. 1. State your name, residence, age, and present occupation.

A. My name is Daniel G. Chizum; my age is sixty-four years; Glasgow, Jefferson county, Iowa; farming.

Q. 2. Were you ever in the Black Hills, in what is known as Whitewood quartz mining district, Lawrence county, D. T.?

A. 2. Yes.

Q. 3. When did you first go there?

A. 3. In 1875, in the month of December.

Q. 4. When did you first leave there?

A. 4. In September, 1876.

Q. 5. When did you again return there, and when is the last time you were there?

A. 5. I think it was about the 1st of May, 1877, when I again returned there, and this was the last time.

747 Q. 6. How long did you remain there in 1877?

A. 6. The number of days I cannot give, but only a short time I remained in the Black Hills country.

Q. 7. State whether, when you were in the Black Hills, you located any quartz mining claims; and, if so, give the names of each claim, and when it was discovered.

A. 7. I helped to locate two quartz mining claims, the Gold Run and the Bobtail. The Gold Run was discovered the day of the Gold Run excitement in the month of February, 1876. The Bobtail was discovered a few days previous to the discovery of the Gold Run.

Q. 8. Who was interested with you in the location of the Gold Run claim?

A. 8. My son, Theodore S. Chizum, and a man by the name of

Hagardy, and myself, were interested in the location of the Gold Run lode, as I call it.

Q. 9. Who was interested with you in the location of the Bobtail claim?

A. 9. Ireton and Carey.

748 Q. 10. Where were these two claims located with reference to the dividing ridge between Shoemaker gulch on the north and the north fork of Gold Run on the south of such ridge?

A. 10. The discovery of the Gold Run lode was made and located on the south side of ridge formed by the north fork of Gold Run gulch, measuring 750 feet from discovery in the direction of the head of Shoemaker gulch, supposed to be a northwesterly course to the southeast end of Bobtail lode, running or supposed to run in like direction, and the Bobtail continued in the same direction for fifteen hundred feet.

Q. 11. How long had you been prospecting and mining prior to the location of the Golden Run and Bobtail claims?

A. 11. Eleven or twelve years.

Q. 12. State whether you were familiar with the points of the compass looking from the top of the ridge between Shoemaker gulch and Gold Run when you located these two claims; if so, you may state how you acquired such familiarity.

A. 12. I was not.

749 Q. 13. State how wide the Gold Run claim was staked and the total length.

A. 13. Six hundred feet wide, measured by stepping, and fifteen hundred feet in length.

Q. 14. Who was it that did the actual work in the discovery, staking, and recording of the Golden Run claim, and if E. D. Haggard or T. S. Chizum did any of such work?

A. 14. Haggardy, as I understood his name to be, done part of the work, and Theo. S. Chizum assisted in the staking and location, and myself.

Q. 15. You may state in detail what was done by Haggard, T. S. Chizum, and by yourself respectively in connection with the location of the Golden Run claim.

A. 15. We all done some digging on the claim, and each one assisted in the location. Haggardy wrote some of the notices and I wrote the balance.

Q. 16. What work did you do, if any, on the claim after the location?

A. 16. I done some digging, part of two days.

750 Q. 17. How near to the top of the divide between Shoemaker gulch and Gold Run did the northerly end line of the Gold Run claim come as you first staked it, and how far from the head of Shoemaker gulch?

A. 17. It did not exceed 400 feet, and it might not have been more than 200 feet from the head of Shoemaker gulch.

Q. 18. How far and in what direction was the discovery of the Bobtail, as you call it, from the northerly end line of Golden Run claim?

A. 18. The distance was from two to (400) four hundred feet and the direction was supposed to be a northwesterly course.

Q. 19. While you remained an owner in the Golden Run claim was any change made by its owners in the position of the exterior boundary stakes as originally established by you? And, if so, state in detail all of such change.

A. 19. Not any that I know of.

Q. 20. Which one of the locations of the Golden Run claim
751 was it who had the location recorded with the mining recorder, and you may give all the details to your knowledge concerning such record?

A. 20. I do not recollect.

Q. 21. When the Bobtail claim was located was it or was it not claimed, staked, and recorded as an extension of the Gold Run claim?

A. 21. Not that I know of.

Q. 22. How wide was the Bobtail claim staked?

A. 22. Six hundred feet, measured by stepping.

Q. 23. By whom was the Bobtail claim staked? And state all the particulars with reference to such staking.

A. 23. The Bobtail claim was staked by Ireton, Carey, and myself. The first notice we wrote with a lead-pencil on a dead pine tree at the discovery hole. The second on the southeast end—then we staked the centre, side, and end lines, writing the necessary notices on the stakes or trees.

Q. 24. State whether the side lines of the Bobtail as origi-
752 nally staked were or were not a continuation of the side lines of the Golden Run in a northerly direction.

A. 24. They were; the sides of the Golden Run we supposed to run in a northwesterly direction.

Q. 25. State whether the course of the Bobtail claim, as originally staked, did or did not continue in the same general direction that you staked the Golden Run claim.

A. 25. I believe the general direction was the same.

Q. 26. State whether or not the Bobtail, as originally staked, was staked in a due north and south course.

A. 26. It was supposed to be staked in a northwesterly course.

Q. 27. State whether or not any changes were ever made in the exterior boundary stake of the Bobtail prior to the time that you left the Black Hills in September, 1876.

A. 27. There were none to my knowledge.

Q. 28. How long was it after locating the Gold Run claim before you located the Bobtail?

A. 28. Only a few days.

753 Q. 29. What did you do with your Gold Run claim, when did you sell it, to whom did you sell it, what interest had you in it when you sold, and what did you receive for it?

A. 29. I sold it; sold early in the spring of 1876. I do not recall the man's name I sold to. He was afterwards killed by the Indians. I held one-third interest when I sold. What I received for it I consider my own private business.

Q. 30. If you received other property as a consideration for your interest in Gold Run, state what the property was and its cash value.

A. 30. I received what I considered a just remuneration, which I was willing to accept without estimating its cash value.

Q. 31. Did you or did you not up to the time you left the Black Hills estimate the Gold Run lead as being of a great deal more value than the Bobtail claim?

A. 31. The indication of the surface of the Gold Run showed to be of greater value than the Bobtail lead.

754 Q. 32. Would you recognize the general course and direction of the Bobtail claim, as you staked it, with reference to the general course and direction of the Golden Run claim, as you staked it, if you were to see a map of the two claims?

A. 32. I think I would.

Q. 33. Examine the map now handed you by the notary and state whether the general course of the Gold Run and Bobtail claims, respectively, are correctly shown on the map marked Exhibit "A."

A. 33. If the platting of the Gold Run is correct then the platting of the Bobtail is incorrect, according to the way we staked it.

Q. 34. State wherein the incorrectness lies.

A. 34. The south end of the Bobtail should come down against the north end of the Gold Run with equal width and continue in the same general course, including an angle near the ends of the lode.

Q. 35. You will now please draw upon a piece of paper, to be attached to this deposition, a diagram showing the course and

755 direction of the Gold Run and Bobtail claims, respectively, according to the points of the compass and their relative position to each other, as you staked, at the time of their location.

A. 35. I now hand the notary a piece of paper on which I have drawn such a diagram to the best of my knowledge and recollection, marked Exhibit "B."

Q. 36. How far was the northerly end line of the Golden Run from the southerly end line of the Bobtail?

A. 36. They were together.

Q. 37. How far did the northerly centre end stake of the Gold Run stand from the southerly centre end stake of the Bobtail?

A. 37. They stood near together. A man could stand and touch both of them.

Q. 38. How far did the northerly centre end stake of the Golden Run claim stand from the Bobtail discovery shaft?

A. 38. Not exceeding 400 feet, and perhaps not more than 200 feet.

756 Q. 39. Where was the Bobtail discovery stake with reference to the Bobtail discovery shaft, and in what direction from the northerly centre end stake of the Gold Run lead?

A. 39. The discovery stake was a dead pine tree. It stood on the southeast end of the discovery shaft somewhere from six to ten feet distant, and stood on the middle line in a northwesterly direction from the northerly centre end stake of the Gold Run—the middle line supposed to be on the lead.

Q. 40. Describe particularly the southerly centre end stake of the Bobtail claim.

A. 40. It was a stub about four feet high. The kind of wood I cannot recollect. It was about 4 inches in diameter on the top and had been somewhat burned by fire.

Q. 41. Were you in the Bobtail lead at its very first beginning or did not Ireton and Carey let you into the Bobtail?

A. 41. Ireton and Carey let me into the Bobtail after they had made the discovery and before it was located.

757 Q. 42. Who was it who took the Bobtail location notice to the mining recorder for record and caused such record to be made?

A. 42. I do not recollect.

Q. 43. When were you last on the Bobtail lead?

A. 43. In the spring or summer of 1876. I do not recollect the day or month, but I am sure that I was not there in the latter part of that summer.

Q. 44. To whom, if to any one, in the Black Hills, have you written regarding your interest in the Bobtail since you left there in 1876?

A. 44. I have not written to any person.

DANIEL G. CHIZUM.

758 STATE OF IOWA, } ss:
County of Jefferson, }

I, J. J. Kreitzler, a notary public in and for said county and State, and — in the foregoing and annexed notice, do hereby certify that I caused the within-named Daniel G. Chizum to come before me in Glasgow, in said county and State, to testify as a witness and give his deposition in the foregoing entitled action on the part of the plaintiff therein; that I proceeded to take his deposition at the time mentioned in said notice; that said witness before testifying was first duly sworn by me to testify the truth, the whole truth, and nothing but the truth; that his answers to the annexed interrogatories were reduced to writing by me in his presence, and that said deposition was afterwards subscribed by the witness in my presence. I further certify that I am not attorney or related in any manner to either party to the action, and am in no way interested in the result of the same.

Given under my hand and notarial seal on this ninth day
759 of January, 1880.

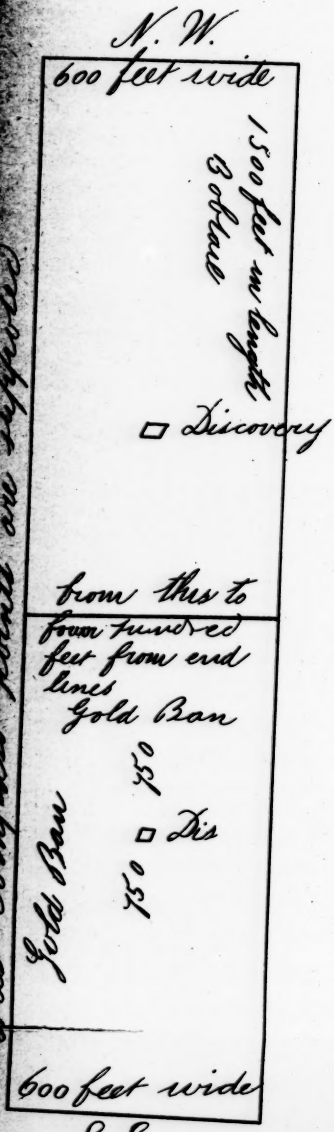
[SEAL.] J. J. KRITZLER,
Notary Public.

Witness fees, $2.50; notary fees and postage, 8.50; paid by plaintiff.

Endorsement on envelope transmitting deposition to clerk of the first judicial district, Dakota Territory:

Caledonia Gold Mining Company (formerly James Delaney *et al.*), plaintiff, *vs.* John Noonan, defendant. Deposition of Daniel G. Chizum on part of plaintiff, taken before J. J. Kreitzler, notary pub-

Marked Exhibit "B"



No 170.
Noonan et al.
v.
C. G. M. Co
p. 760.

lic, rec'd Jan. 19th, 1880. A. R. Z. Dawson, clerk. To clerk of district court, 1st judicial district, county of Lawrence, D. T., Deadwood.

(Here follows diagram marked p. 760.)

761 MICHAEL GIBBONS was next called as a witness on the part of plaintiff and testified as follows:

I first came to the Black Hills on the 13th of June, 1876. I am one of the locators of the Clara No. 2; I am acquainted with Thomas F. Mahan. Mahan acquired an interest in the Clara No. 2 about the 6th of July, '76. I first saw a Neptune stake about the 9th of June. James Grant, Bob Griffin, Dan Murphy, and John Dawson were present when I first saw it; it was lying on the hill side about 75 or 100 feet from the Bobtail discovery shaft. We wrote on it Neptune discovery. As far as I remember it was the northeast corner stake of the Giant, but I could hardly read anything on it; there was nothing on it indicating it to be a Bobtail stake. Dawson wrote the Neptune notice on it. Before doing so I scratched off the writing that was on it, then stuck it up at the Neptune discovery, which was what is known now as Clara No. 2 shaft. In Sept., '76, there

762 was a little rumpus on Clara Hill between the Giant and the Clara No. 1 company. Henry S. Ireton was present in company with John Flaherty and John Goddard; Thos. F. Mahan was also present. Mahan heard the conversation in the fort between Ireton and the party that were there. Ireton came there as a *piece*-maker in behalf of the Giant boys. Ireton allowed that he had an old title there called the Bobtail, but as he had not complied with the laws he had given it up and never intended to claim it any more. I was then cabining in Lead City with Mahan. After we left the hill Mahan remarked to me that we were a lot of damned fools going and fighting for Jack Dawson, because our ground was not up there at all. I lived with Mahan from the first of January until between the first and 5th of March. The first I heard of Mahan laying any claim to the Bobtail was, I think, in the latter part of April or 1st of May, '77. The Gunn and Moore contract shaft on the Clara No. 2 was completed, I think, some time in Oct., '76. About the 1st of Feb., 1877, the Clara No. 2 claimants bounded

763 that claim to Bailey. I signed the bond in the cabin where I lived, in presence of Harrington, John McMasters, Mahan, & Bailey. Bailey did not want to bound the north end of the Clara No. 2, because he said he had heard something about an old location covering it and therefore we bounded the south end. The location was the Bobtail. Mahan told him that that title had run out on the 24th of Feb., in consequence of no work having been done on it. Mahan also said that as far as that was concerned he would make it all right. That was all the conversation in regard to the Bobtail, Canty was killed in our cabin by Harrington either on the 10th or 11th. I was sick pretty much all that month. Mahan took care of me part of the time. From the time Canty was killed, in February, Mahan was around the cabin mostly all the time during that month. I don't remember of his being away over

a few hours, twice or three times a week, chopping wood. About the 1st of March until the 5th or 6th he worked some on his toll
764 road. There was one afternoon about the first of Feb. when he went over to Gayville by the way of Clara Hill. That same afternoon he cut down a stake of the Grand Prise, and went up on Clara Hill for that purpose. He told me he was going up there to cut down that stake. I was a claimant of the Queen of the Hills as well as Clara No. 2 at that time. I was on the ground where the Clara No. 2 discovery shaft and Bobtail discovery shaft are a day or two after the relocation excitement on March 15th.

Q. 14. When were you there before that—the last time before that?

A. I was up on top of the hills along about the 26th or 27th of February, I believe.

Q. 15. At the time that Gunn and Moore completed their contract upon the Clara No. 2 shaft? State whether that shaft was measured.

A. Yes, sir.

Q. 16. Who by?

A. By me.

Q. 17. Did you go down to the bottom of it?

A. Yes, sir.

Q. 18. Know the appearance of it?

A. Yes, sir. About the 20th of March Mahan, Moore, Gunn, and myself started to work on the dump on the Clara No. 2. We first built the cribbing for the dump. We worked there only one or two days—that is, all four of us on top. The condition of that shaft when we went to work there about the 20th of March was just the same as it was in the fall of '76. No work had been done on it. I saw the Bobtail discovery shaft both on the 20th of March and on the 26th or 27th of February,
765 and no change had been made in it between those dates. There were no signs of any fresh or recent work having been done anywhere within 50 feet of the Bobtail discovery shaft. I first became acquainted with the stake claimed as the south centre end stake of the Bobtail on the 9th of June, '76. It had written on it Bobtail discovery, and I think it claimed 1,500 feet. It was about 20 feet high, and was standing there on the 20th of March, '77. Mahan and myself cut it down when we went to work on the Clara No. 2, and used it as part of the cribbing. We supposed the Bobtail had run out for want of representation. I talked with Mahan about it. Of course he had agreed it had run out. I worked there off & on —not steady—all through that month and part of April. I saw the Clara No. 2 supplementary notice a day or two after the relocation excitement. It was posted on the southeast corner of the shaft up on the bank on a short post. It was placed inside of a candle-box and tacked to it. I never saw any Bobtail notice posted near the Bobtail discovery shaft after the 14th of March. If there had been a notice on the bank immediately east of the Bobtail discovery shaft I would have seen it. Mahan never said anything about
766 posting a notice on the Bobtail in March, '77. I first heard of it from Gunn the latter part of April or the first of May,

1877. I first knew Clara No. 2 discovery shaft, I think, on the 6th of July, '76. I saw it on the 9th of June, '76, when I located the Nepture. It was then a hole about two feet in depth. The cut that run into where that hole was was dug by Mahan about the middle of July. I could not say how long it was, but the cut was about 4 or 5 feet wide. Mahan told me that he went there about the 7th or 8th of July and enlarged this hole—that it was getting too hard and needed blasting. I went up and showed him where to start the cut. It was not any deeper then than the top of the shaft as it is now. He ran the cut as I directed him. It started inside of the road and run right direct into where the shaft was. I could not say how much space there was between the left end of the shaft and the face of the bank. About the 17th of March I had a conversation with Mahan. I had gone up and read some of the notices and saw that Noonan
767 was left out of the Queen of the Hills. I asked Mahan what he thought of it, and he said to hold on; that he would get even with them yet if he could get what he was after, or something to that effect. In the fall of '76 and down to the 20th of March, '77, the old trail ran right below the Bobtail discovery shaft. I was there in July—the 16th—of this year, when that shaft was uncovered, in company with Gunn & Dawson. We located the point of that shaft before it was uncovered. We had talked the matter over before Mahan came there. He located the place within two or three feet of where we did. The trail in the spring of '77 ran within 4 or 5 feet of the lower or west side of that shaft. It was on the same level with regard to the cut that was run into the hill in which this hole was. I saw the notice on the stump or dead tree south of the Bobtail discovery tree in 1876, I suppose, about 100 times. There were no inscriptions upon that tree in '76 that I saw showing it to be a Gold Run stake. I first heard that Mahan claimed to
768 have put a notice there in '77—along about January or February, '78—at the time of his survey. I was mistaken in saying in my direct examination that I first heard of it from Gunn in April or May, '77. I was on the ground two or three days after that survey. I saw a Bobtail stake and notice at the discovery. In the summer and fall of 1876 I must have been over the ground within 300 feet to the south and to the west of the Bobtail discovery shaft hundreds of times. In the fall of '76 I use- to come there very often to sharpen tools, and saw Gunn & Moore at work upon their contract. I never saw any Bobtail stakes on the southerly end of the claim up to March, '77, except this discovery tree. In August, '76, I saw another dead tree. It was — north end of the Bobtail, and claimed 1,500 feet south. It was a dead pine tree about 20 feet high. I last saw it in November, '76. I never saw this large tree which they now call the northwest corner of the Bobtail. That tree which I saw in August, '76, stood about from 10 to 20 feet from the corner of the ditch that runs around the side hill now. Ireton knew that we were in possession and working on the Clara No. 2 in the summer and fall of '76. The only time he ever said anything about it was in the conversation that took place on
769 the hill. Mahan never claimed any portion of the Clara

ground under the Bobtail title as against us. The time that I signed the bond in the cabin Mahan said that the title to the Bobtail would run out on the 24th of that month, and it would never bother him. The Bobtail discovery shaft was about a foot deeper when it was dug out on the 16th of this month than it was when I originally saw it. It was about a week after I commenced work on the Clara that the wheelbarrow was brought there. I don't know who owned it, but Tom Carey and Dan Regan claimed it. Regan came there and claimed it, but Mahan would not give it to him. They had some words about it and the wheelbarrow disappeared. That was the only wheelbarrow that was on the Clara No. 2 in the spring of that year. The contract that was let by the Clara No. 2 owners was drawn up in the Senate Saloon in Deadwood. It was between John Manning, me, and Thomas Mahan to Gunn and Moore. This contract was for running a tunnel upon Clara
770 No. 2. Gunn drew up one which I think was torn up. I would not sign it because Mahan wanted to bring in the Bobtail tunnel and the notice. The bar-keeper made out the one which I signed. It was to run a fifty-foot tunnel on the Clara No. 2, and is the same tunnel upon which Kello predi-ated his $500.00 certificate. Upon the day on which this contract was drawn up Mahan tried to coax me into the Bobtail, and that we would burn the Caledonia men up with this Bobtail. In the spring of '78 I had another conversation with Mahan in Ben Barr's saloon. He wanted me to stay with him and he would give me an equal interest, and we would clean out the Caledonia people and own the whole hill. He told me that he had the Bobtail fixed so as he could make a deed to any part of it whenever he liked; that it was all in his own hands, and if I would recognize it and go in with him he would give me my proportion. I did not accept the proposition because I did not think it was right. John Noonan did not claim any interest in the Bobtail at that time to my knowledge.
771 Mahan said that the Caledonia was on record ahead of the — No. 2, and by using this title we would get away with the Caledonia. This work that was done on the Clara No. 2 tunnel was not in any sense to my knowledge Bobtail work. I do not know of any statements that were made by Mahan in connection with this work as being Bobtail work. I made no relocation in January, 1878, of the Clara lode or Bobtail lode. I first heard of such location a few days ago. I never authorized anybody to make a location or relocation for me, nor did I authorize Kello to make a survey. I think some time in the winter of '76 or '77 Harrington, Mahan, and myself made a deed to Gunn & Moore of an interest in the Clara No. 2. I think I acknowledged it in March, '77. The Queen of the Hills Company did some work on the Queen of the Hills ground east and a little north of the Caledonia discovery shaft in the fall of '77. The work was an open cut and was run for the purpose of finding a ledge there.

772 On cross-examination the witness further testified as follows:

I do not remember the date. I acknowledge the deed, but I think it was some time in March, '77. I do not know who the officer was; do not know whether it was before a notary public, justice of the peace, or clerk of the court. Mahan also acknowledged — I signed for Harrington, who was out of the country. The deed was from Harrington, Gibbons, and Mahan to Gunn & Moore for a two-fifth interest. It was delivered to them along in the winter, some time before Canty was killed by Harrington. Harrington remained in the country about a month, more or less, after he killed Canty. I had a power of attorney from Harrington to represent him in his interest in the Clara No. 2 quite awhile before he killed Canty. I had been sick about two weeks before Canty was killed. I was sane all the time, except one night I think I was a little off. I used morphine during my sickness. I went over to the cabin of Cooper and Delaney between the first and
773 *and* fifth of March. The bond of the Clara to Bailey was executed about the first of February. I do not know where it is. I never saw it since I signed it. Mahan, John McMaster, Bailey, Harrington, Moore, Gunn, & Canty were there when it was signed. The bond — sent to Bailey, but of that I am not positive. I do not know that McMasters took that bond in his own name for Baley. I could not say who witnessed it. The conversation at that time in reference to the Bobtail was carried on between Mahan, Baley, McMasters, and the whole of them. I was in bed, but I heard it. Mahan told them that the Bobtail would run out on the 24th. I did not say a word to Bailey about the Bobtail. I saw a notice there. I don't know what Gunn & Moore and Harrington said. Mahan, Bailey, McMasters, and all of them talked about its running out. I did not say anything, because I had a partner, Mahan, to do it. He was my partner in all my business. I went to
774 work on the Clara mine about the 20th of March. I fix the date from the relocation. I was not present on the hill on the 15th of March, but I heard everybody talking about it. I never stopped at the cabin of John A. McMasters before I went to the cabin of Delaney & Cooper, but I might have slept there a night or so. I worked on the Clara mine 3 or 4 days steady in M'rch, '77, with Gunn & Moore. We started in about the 20th, then in the month of April I would go back and do a day's work once in awhile. I sold my contract in a mine at Bear Butte early in May, '77, to Chas. Ann. I paid Gunn & Moore $20 apiece, not altogether for work, but because I thought they needed money. I did not have any settlement with them. I was at Bear Butte in January, '77. I did not do any work there in Feb. and March. I went over there again in the latter part of April or first of May, but cannot give the date of either visit. I think it was in October, '77, when Gunn drew the contract for the running of the tunnel below the Bobtail shaft. I do not know what has become of that contract.
775 I guess it was tore up. I do not know what it stated with reference to the Bobtail tunnel. There was something that I would not sign, anyway. I could not say how long after that that it was that Mahan said he would give me an interest in the Bobtail

if I would pay my proportion of the cost of it. It was long after that. I could not say anything in relation to Gunn & Moore, and Mahan—among them, Webber—making an agreement that that work should represent the Bobtail, so far as they were concerned. I did not take any active part in getting Gunn & Moore to accept deeds in the Bobtail in the early part of '78. I have been at outs with Mahan for about two years. I did not say that I saw Mahan cut down the Queen of the Hills stake, nor any of the Grand Prize stakes. I know Judge Thompson. I believe Mahan, Thompson, and Weber, in the winter of '76 & '77, owned the toll-road
776 running from Lead City down Gold Run. I saw Mahan at work some time during that winter on that toll-road above Whitewood; cannot state the month. There was a tree fell across the road, and he was chopping it and taking it away. There was another party there chopping it up with him. Mahan told me that they leased that road to Captain Ward and J. Ames in '76. I don't know how long Ward, Ames, and May had it. The discovery tree at the south end of the Bobtail in 1876 was a dead tree about a foot through and from 18 to 20 feet high. The first work Mahan and I did, about the 20th of March, was to cut down that tree. Moore was present. I know that Mahan paid Moore & Gunn money for the work that was done on the tunnel.
777 On the 27th of Feb., '77, or along there, I was upon the Clara hill. I saw nobody at work to the north of me. We were up there on the 26th or 27th building a fort over on that hill. The fort was right on the hill over the Bobtail discovery. It was built on account of some trouble between the Giant and Clara. I cannot think of the names of all those who were there when Ireton, Flaherty, and Goddard came. Gunn, Moore, Lynch, and Heffron were there. The fort was built of stones and old logs. They all had guns and pistols. Ireton talked in the capacity of a peace-maker. Flaherty was standing by when Ireton stated that he had not complied with the laws. I cannot say whether Mahan was inside or outside of the stone-work. Ireton addressed his conversation to the Clara No. 2 people. We did not attach much importance to what he said.

778 On redirect examination the witness further testified as follows:

There was no demonstration of hostility towards Ireton. I was there on the 26th & 27th of Feb., '77, building another fort on account of new trouble between the Giant and the Clara; Mahan was also there. I think we finished it on the second day. We commenced it on the 26th or 25th; I may be mistaken to a day. The time that Ireton and Flaherty were there was in September, '76. That fort was not built the 26th or 27th of March instead of February. Bob Carruthers did not work on it, though I will not swear that he was not there. This fort was built from 5 to 700 feet above and south of the Bobtail shaft, and was not on Bobtail ground at all. Tom Mahan, John Dawson, James Delaney, McGowen, Alex. McMasters, and Henry Lackey were with me on February 27th, 1877, building the fort on Clara Hill, but I cannot say positively whether

it was the 26th or 27th. Mahan stood guard there the first
779 night. The fort was in sight of the Bobtail discovery. You could look right down from it on the dump. I did not see Mahan working at that time on the Bobtail discovery.

On recross-examination the witness further testified as follows:

At the time this second fort was built the Clara No. 2 parties were there just for friendship'- sake. We had no trouble with the Giant owners.

780 WILLIAM GUNN was then recalled as a witness for plaintiff and testified as follows:

I do not think that the contract under which we ran the 50-feet tunnel in the fall of '77 is now in existence. I have looked for it several times, but could not find it. The last time I saw it it was in my possession.

On cross-examination the witness further testified as follows:

The last time I saw it was in the cabin where I lived. The last time I saw it was in the winter of '77, or early in '78. There was no extension of that contract for the sinking of any other number of feet.

On redirect examination the witness further testified as follows:

We sank that shaft 35 feet. It measured 45 from the surface. We did not measure it from the starting point at the bottom of the cut. There had been a platform made around there for a
781 windlass. I first saw the place where the shaft was sank about the 10th or 12th of July. The ground was pretty well broken up. The cut was in about 8 feet, was run in about 20 feet before we took the contract. Very shortly after I first saw it I saw Mahan at work in it. This cut was run right up a little hole that was dug directly in front of it. The entire cut was run by Mahan. I assisted in extending that cut further to the east after we went to work there. I was working on the shaft at the time of the rumpus on Clara Hill, in August & September. We had erected a fort a short distance to the west of the Giant cut. That was about 750 feet distant from the Bobtail discovery or Clara No. 2 shaft. Ireton came up and remarked that he thought that it was very foolish for men to have so much trouble and fuss about quartz claims; that nobody knew whether they were of any value or not; that he had made a location where the Clara No. 2 is now, called the Bobtail; that he had not paid any attention to it; that he was engaged generally in placer
782 mining, and, as far as he was concerned, he would not expend any money on any quartz claim that he knew of in the country; that he did not have any further claim on the Bobtail; that he had abandoned it, and had not complied with the laws, as he understood them. I had no knowledge of such a claim as the Bobtail being in existence until that day. We resumed work

on this shaft between the 15th & 20th, —, '77. Moore, Gibbons, Mahan, & myself worked there some days; Mahan would not come at all. He use- to say he was working on the toll-road. Moore & myself did most of the work. Gibbons did not work regularly. He claimed that he was not feeling well. Towards the latter part of Feb. I use-to go over the hill very often, going from Central, where I lived, to Lead —, making arrangements to start on the Clara No. 2 as soon as possible. I always went past the Clara No. 2 shaft. During those visits, and up to the 20th of March, there had been no work done upon the Clara No. 2 shaft, or what is called the Bobtail discovery shaft. If there had been any I would have noticed it.

783 I was present at the time the bond was given to Bailey; there was a general conversation, and we gave him an explanation in regard to both of the conflicting claims, the Bobtail and Caledonia. I don't know who was spokesman for the party. In regard to the Bobtail, we told him that one of the locators had acknowledged in the presence of a great many witnesses that he had abandoned it, and, any way, if he had not abandoned it his time would run out on the 24th. Bailey finally perferred to take the south end of the claim on account, I think, of the conflict of the Caledonia. I did not see any Bobtail notice when I went back to work there in March, '77. If it had been posted as notices generally are I could not help but see it. Our Clara notice was posted in a candle box and nailed onto a stake at the southeast corner of the Clara No. 2 shaft. The trail at that time passed not two feet from the Bobtail discovery shaft. I was there on the 16th of July when they uncovered it, and pointed out the place where I supposed it was. Mahan pointed out the same place as I did.

784 When we went back there in the spring of '77 we commenced to grade off a dump, and built cribbing in front of it; we all worked on this cribbing a very few days, and then Gibbons & Moore went to work in the shaft, and Mahan & myself kept working on the grade of the dump. The Bobtail cut was about 25 feet distant from the old Clara cut, which Mahan dug in '76. That was unbroken ground when we went to work there in March. The Clara No. 2 shaft was the same depth when we went back to work there in March—35 feet; we used a windlass, bucket, and rope. Mahan brought a wheelbarrow there late in March or early in April, and it was used to wheel back the rock from the shaft on the dump. The edge of the dump was about 25 feet from the further edge of the shaft. Mahan & Regan had some words about the wheelbarrow; Regan claimed it was his, and Mahan claimed it was Carey's. I know a tree that has since been called the Bob-

785 tail discovery tree; I must have seen it when I first went to work; I noticed no inscription on it that I remember. The tree was at least 20 feet in height, and in the neighborhood of a foot in diameter; that tree was cut down, I think, by Mahan & Gibbons when we started to grade the dump; it has never been cut down but once, to my knowledge; we used it in the cribbing; the stump has been chipped off considerably. Pretty soon after we commenced working there Carey passed down the trail, apparently coming from

Lead City; Mahan and myself were working on top; Carey stopped, and he and Mahan entered into conversation; he mentioned that he had at one time been an owner in the Bobtail location, and had exchanged it for an interest in a placer claim. Mahan said that it was a pretty good thing, and if he had stopped on there and attended to it that it was good property. I have no recollection of Carey suggesting to me that I should purchase the Bobtail. That same day Mahan and I had some conversation with regard to the Bobtail; Mahan was grading off the dump on the
786 north end, and in the grading he partly filled up this Bobtail shaft. I objected to it, and told him he was wrong; that that should be left open; that it would show for itself the amount of work that was done there. He replied that it did not make any particular difference; that the amount of work that was done there was a matter of public notoriety; that there were too many that were acquainted with the location for it ever to give any trouble. I told him that that may be very true, but if any other party should come and purchase this and afterwards claim that we had destroyed the original work that was done there, covered out of sight, they could give us a good deal of trouble; that if the Caledonia party should *should* get hold of it our chances for the 500 feet of ground in dispute between us would be very slim. We finally agreed the best thing to be done was to purchase the Bobtail or get in on the best terms we could. We did not suppose at that time there would be any consideration required. Gibbons was not at work on that day. Moore was present during this conversation.

In pursuance of that agreement I went to Gayville to hunt
787 up Ireton, but could not find him. The Monday following the purchase of the Bobtail Moore informed me that Mahan had secured the title to it. The next day Mahan told me that he was to pay $1,500.00 for it. He told me that he had raised some money from a friend of his in Gayville and was to pay [the] balance in October. The agreement was that each member of the Clara No. 2 Company should pay in proportion of his interest whatever the expense was. He demanded a proportion from me of $28.00. That was the latter part of April and when I had found out that he had agreed to pay for it only $140.00. Jack McMasters, Alex. McMasters, Frank Coyle, John Dawson, Henry Lackey, and Mathew Moore, Gormon, and Mike Lynch were present at the building of a new fort on Clara hill in the latter part of Feb., '77. The fort was about 400 feet southeast of the Clara No. 2 shaft. Both the Bobtail shaft and the Clara shaft were in sight from the fort. We built it in one day. Thos. F. Mahan was there. I first was informed from Mahan of his claim to the Bobtail in the latter part of March, '77.
788 This was after this deed had been obtained. He declined at that time to deed me the one-fifth interest, but offered to do so in General Dawson's office in Deadwood the latter part of April, '77. We were still working on the Clara No. 2, and I enquired of Mahan if he was going to fulfil his agreement about the Bobtail. He replied that he was ready at any time to make out the papers, and wanted to know if we preferred to have an undivided interest

or have the interest segregated. I told him we were not particular as to that. He preferred giving us a segregated interest, and the next day he brought over a tape line and we started at the Bobtail discovery, and measured off 600 feet northerly. We came down to Deadwood, and he then wanted to make out a deed for ⅓ interest each, myself and Moore, in this 600 feet that we had measured off. To that I objected. He then proposed to make us out a deed for a 150 feet undivided, and to that I also objected. The reason which he claimed for not wishing to give us a full deed in proportion to the amount we owned in the Clara No. 2 was that it interfered
789 with other ground which he owned, the Queen of the Hills. We told him that was not the understanding when he first purchased it. The design was to procure this title and then let it rest, and we had no desire whatever to interfere with his Queen of the Hills—to make us out a deed for an undivided ⅓ interest each outside of the Queen of the Hills stakes. He at first agreed to that, and then immediately backed out and would not consent. We told him right then we were not particular about getting a deed anyway, and if he thought it was no service to him he was welcome to keep it. I had no further conversation with him about it until October, '77, when he came to Moore & myself, representing that he was out considerable money on this purchase, and he thought it was wrong that he should be compelled to pay all this money when we had proposed to him to purchase it. I told him it was his own fault; that if he had done as he agreed to we would each pay our proportion of the amount. This conversation took place when we were taking the contract from the Clara No. 2 people for the
790 tunnel. I drew the contract in the Senate saloon. It was agreed that we should run a tunnel 50 feet and receive a certain amount per foot. Mahan, Gibbons, Moore and Manning were present. Gibbons refused to sign it because the lode was not mentioned nor the starting point. The barkeeper drew up the second contract, which was satisfactory. The Clara No. 2 lode was mentioned. That contract was signed by all the Clara No. 2 claimants. We ran a tunnel 50 feet. An arrangement was then made between Moore and myself with Mahan in regard to the Bobtail that we should give Mahan credit to the amount of $28.00 each on his assessment on that contract work; that was to reimburse him in the purchase of the Bobtail. We were expecting trouble with the Caledonia Company at that time; they had opened up a large ore chamber of rich ore and we was satisfied that it was on our ground; we started this tunnel with the expectation of cutting this same vein, and if we should strike anything we expected to
791 commence a suit to quiet the title between the two locations; we did make an attempt to commence suit in February, '78, and employed Judge Gaffy; Mahan knew of that fact. Some time in Dec., '77, we thought it advisable to make a survey of the Clara No. 2 and also of the Bobtail, and we engaged Kello. I was there when the northwest corner stake of the Bobtail was looked for. Carey, Kello, Mahan, Cariso, and Moore were present. We got together on Clara No. 2 dump. Mahan led the party to this northwest

corner stake; Carey thought that that was the stake; I could not say that I had ever seen that tree before that time; the writing looked rather fresh on it, I thought; it looked too bright to have been there from the 24th of Feb., '76. No other stakes were found upon the ground at that time that I am aware of. I believe that the discovery tree of the Bobtail was pointed out as the south centre end stake by Mahan, and he referred to Carey for his correctness, and Carey agreed with him. I was not there when they run off the south end of the Bobtail. Kello started of- to survey the Bobtail;

792 we just simply went over and examined this northwest corner, and there were objections made to us making the survey on the Bobtail. Then he went on and completed the Clara survey on the same day. I was there afterwards when he finished the survey of the Bobtail. I pointed out to the surveyor the Clara No. 2 tunnel as Bobtail work because we wanted to prevent a sale of the Caledonia mine, which was bonded at that time. We expected to commence litigation with the Caledonia Company as soon as possible and we wished to prevent it falling into the hands of a wealthy company. Mr. Kello looked around and enquired where the work was done on this Bobtail lode. There was no discovery to show him; no work to show him except this, the date of the Bobtail record, it being an older location than the Caledonia. Setting up the stakes and representing it to be work done on the Bobtail to parties that did not know any better, we considered it would be very likely to prevent them from making a purchase. The title we contemplated

793 commencing proceedings against the Caledonia on was the Clara No. 2. I did not understand when the survey was made that there was any application for a patent connected with it. I do not recollect of Kello enquiring as to the names of the original locators of these claims, nor of any names being given to him. There was no relocation certificate of the Clara and Bobtail filed at that time to my knowledge. I found it out first some few days ago. I filed a location certificate of the Clara in Feb., '78. In April following the survey I saw the notice of application for a patent and the diagram of the claim posted on the Bobtail. The deed from Harrington, Mahan, and Gibbons to the Clara No. 2 ground was acknowledged about the 13th day of Feb., '78. I frequently told Gibbons that I did not think Mahan would ever acknowledge that deed, and I told him that I would pretend with Mahan to stand in with him on this Bobtail arrangement until I could get the deed acknowledged. I told Mahan that the trouble was with Gibbons; that I could not get Gibbons to acknowledge it. Finally I got them all down in

794 Deadwood, and got them all to go before a notary public and acknowledged it; and after Mahan acknowledged it I spoke to him in regard to deeding the Bobtail interest. Mahan said he was ready to do so, and I think I told him that I had considered the thing over and did not want it—I refused to take it. I think it was acknowled before Jas. F. Watson. I have not seen that deed since September, '79, when I think I turned it over to Judge Claggett. Another reason for the refusal of this deed was because the south end of the Bobtail took in the Clara No. 2 shaft. I had been

misinformed by Mahan in regard to it all the time. He told me that the Bobtail line was at the Bobtail discovery, but at the time of the survey I found it took in my Clara No. 2 shaft.

795 Q. 60. While you were on this fort up there on the hill about the latter part of February did you see anybody working upon the Bobtail discovery shaft or into that neighborhood?

A. No, sir; there was no one present.

Q. 61. If any person had been working during the time you were there at those points would you have seen them?

A. I would.

Q. 62. Do you know where the southwest corner now stands as surveyed for a patent?

A. I believe I do.

Q. 63. You say you were at that fort the latter part of February—about that time; do you recollect?

A. Somewhere between the 24th and 27th of February.

By same. You were there one day?

A. One day—yes, sir.

By same. When you went back to work as you say on the Clara No. 2 the 20th of March, '77, did you observe the work on the Bobtail shaft?

A. I did, sir.

By same. Has there been any work done on the Bobtail shaft prior to that time since you were at work there the fall before?

A. There never was an hour's work done on the Bobtail shaft since I have—while I have been in this country until it was done the other day, on the 16th of this month—not one hour's work on that shaft.

By same. Was there any work done on the cut—on the

796 Bobtail cut or grade there—from the time you quit work on the Clara shaft in the fall of 1876 until you commenced again in the spring of '77?

A. No, sir; nothing whatever. There was only two small holes there that I know anything about that I am aware of, and they had never been touched.

By same. Then the first work that was done in that vicinity either upon the Bobtail or the Clara was that which you commenced, say, about the 20th of March?

A. It was.

By same. That is the first work?

A. That is the first work that we done.

By same. Was *there* Mahan with you?

A. He was.

Q. 63½. During the summer and fall of '76 while you were working on this shaft how frequently did you have occasion to go right around in the vicinity of where the southwest corner stake of the Bobtail now is?

A. During that year?

Q. 64. In the summer and fall, '76.

A. The southwest corner?

Q. 65. The southwest corner.

A. I use to pass there frequently.

Q. 66. For what purpose?

A. There was timber; some poles and light timber which we needed in the shaft. I use- to go up there and cut them, and get them occasionally around there; they were convenient.

Q. 67. To work in that shaft?

797 A. Yes, sir.

Q. 68. How often were you in the neighborhood of the southeast corner in the summer and fall of '76?

A. Not so often; very seldom.

Q. 69. Did you have occasion to go over there in that direction for any special purpose?

A. I did.

Q. 70. What was that purpose?

A. I went over there to cut slide poles for the shaft for the bucket to run on.

Q. 71. Skids?

A. Skids; yes, sir.

Q. 72. Did you ever see a Bobtail stake anywhere in that vicinity in '76 except this discovery tree?

A. That is the only Bobtail discovery; that is the only tree I have seen.

Q. 73. If there had been any such a Bobtail stake standing there in '76 within 50 or 100 feet of where those corners are now, would you have seen it?

A. Around the southwest corner there was considerable underbrush and timber through there, and unless the stake was marked very plainly a man might pass there and perhaps not see it. I have seen all the balance of the stakes in '76 that——

Q. 74. Did you ever see this stake marked after your attention was called to it—this discovery tree of the Bobtail—at the time

798 Ireton made the declaration on Clara Hill?

A. No, sir; I have no recollection of ever seeing that—seeing any inscriptions on that tree; I might have seen it and forgotten it.

Q. 75. Were you around the vicinity of the southwest and southeast corners while you were at work there in March, April, and May, '77?

A. In the neighborhood of the southeast?

Q. 76. Southwest and southeast corners.

A. Of the southeast corner in March, '77, I was there considerable; got considerable timber up there, dry logs and stuff, to put cribbing in the dump; we took most of it from up around there.

Q. 77. Did you see any Bobtail stake there in the spring of '77?

A. No, sir; I never did.

Q. 78. If you did, you would have seen it in case there had been any stakes there?

A. I think so.

Q. 79. Did you see other stakes standing there in the neighborhood?

A. The Queen of the Hills stake was standing there convenient.

Q. 80. In the spring of '77 were you ever on the north end of the Bobtail claim as it is now claimed?

A. The spring of '77; yes, sir.

Q. 81. How frequently?

799 A. I was there first on the north end of that in '76; in the fall of '76 I prospected around there.

Q. 82. What were you doing prospecting?

A. I prospected where the Mono discovery now is; made that location.

Q. 83. Were you one of the locators of the Mono?

A. Yes, sir.

* * * * * * *

Q. 88. Did you ever see any Bobtail stakes?

A. I did not.

Q. 89. Did you ever see any side stakes of the Bobtail?

A. Side stakes; no, sir.

800 On cross-examination the witness further testified as follows:

I sold my $\frac{1}{5}$ interest in the Clara No. 2 to the Caledonia Company in September for $5,000.00 cash and $5,000.00 more on the winning of this suit. The fort that was built in Feb., '77, was about 400 feet southeast of the Clara No. 2 discovery. I could see the cut of the Clara No. 2 from the fort. This fort must have been about 700 feet of- the Giant cut. There was dead timber on the hill at that time. I pointed out this tunnel to the surveyor the last days of Dec., '77. The Giant people had a notice here in the paper at one time cautioning all parties not to purchase the Clara No. 2. It was after the building of the fort, and I afterwards heard it was called out on that account.

801 MATHEW MOORE was then recalled on the part of plaintiff and testified as follows:

I was at the Clara No. 2 fort at the time Ireton came up there. Nobody that came up was halted by the parties in the fort with guns. Ireton said that he had a location over there called the Bobtail; said he did not think he had done sufficient work to hold it, and that he would not bother about it. He knew that we were working at that time on the Clara No. 2. He said that it looked well and he was very proud of it. It was late in the fall when we completed the shaft. On the 20th of March I was living in Hidden Treasure gulch. I was over the trail several times between January and the 20th of March. The fort was built the last day of February. In a day or so after we built the fort we went over to see Mike Gibbons and that was the last time before I went to work. There was nobody at work on the Bobtail discovery shaft or Clara No. 2 shaft during those visits, nor did I see any signs of any further work having been done on the dump or cut.

802 Whenever we went back to work no change had taken place in the Clara No. 2 shaft, nor in the neighborhood of the Bobtail dump, from what it had been when we quit work in the fall of

'76. I was there when Tom Mahan filled up the Bobtail shaft. There were two or three boulders right over this discovery; one of them rolled in; the other was too big, and Gunn asked us to give him a hand to roll it in. I told Gunn that we ought not to fill it up; that we had better to leave it open. He said, Oh, dang it! there has hundreds passed this trail that have seen this hole—and he went on and filled it up. I did not see any notice of the Bobtail posted there when I went back to work. The Bobtail discovery tree was cut down the second or third morning after we went to work there. It was about 18 or 20 feet high, but after we cut it down I don't know what hight*h* the stump was. I was in the cabin when the bond was signed to Baley. The boys talked about the Bobtail, but I cannot exactly say what the words were. Mahan said there was no difficulty excepting the Bobtail, and that that would
803 be out on the 24th, I think, of Feb. The Bobtail discovery tree was put in the cribbing.

Q. 52. What do you know about Tom Mahan buying the Bobtail after you commenced work there in March, '77?

A. Tommy Mahan, Billy Gunn, and myself were talking there after this hole had been filled up—I think it was that day. Billy Gunn and self were talking about the Bobtail. Billy said it would be a good job if it could be secured and get it into the hands of a company and there would be no bother about it with the Caledonia. Says Billy: We have got to contend with it, and if they get a hold of that, says he, it may make a good deal of bother for us. That is very true, says Tommy; you — better go down to Gayville, says he, and see if you see him there to-night. Billly went down there. I did not go after him. Billy went down there—I don't know—he did not say. He came back and told me he could not find him—no track of him. We came up and went to work that day and Tommy and himself then they were talking about it. We ate dinner and Tommy says we ought to go down and hunt him up if he was in the place; so he went down at night or next day—I do not know which—and the next morning then we went over
804 to work. I do not know. I went down, I know, to Tommy's cabin down to Lead, and Tommy was at breakfast. Tommy came out and he says, says he, I made a job of that. I say, All right, Tommy; I think it is a very good thing. And he told me he got the deed. I asked him what kind of an agreement did he make with him. Says he, We had to pay him $1,500.00. That is pretty steep, says I, Tommy, to pay that amount of money for that. Well, says he, We got it cheaper, but don't let — anything to Gibbons. Well, we come on. I came up to Billy—Tommy did not go up then—he told me he got it in his own name. By God, Gunn, says I, there is something curious about this; Tommy has got that deed in his own name. No, says Billy; he would not do that. What would he do that for? Says I, the understanding was they was to go and secure this title and protect any one getting it outside the Clara No. 2 Company. When Tommy came up Billy and himself had some talk. I do not know what it was. I was down in the shaft working. So, then, it went on; in a little while Billy and

himself was talking; they would come down and come to some conclusion—he would give an interest in it—and I kicked.
805 I said I wouldn't have it; that we bought that ground to protect the Clara No. 2 Company; and he told me he was going to beat Mike Gibbons out of his interest in it if he could; and, another thing, he was going to get the best thing of the Queen of the Hill- boys.

Q. 51. Did you or Gunn tell Gibbons about this when he came back from Bear Buttes?

A. Billy Gunn did.

Q. 52. About his buying the Bobtail?

A. Yes, sir.

Q. 53. Were you present at the time—down here at the time—that a deed was made—offered to be made—by Mr. Gunn, or some talk about a deed for your fifth interest and Gunn's fifth interest in the Bobtail some time in April?

A. Yes, sir.

Q. 54. What time was that, if you can fix the time definite-?

A. I could not exactly say, but I believe it was the last days of April, as near as I think.

Q. 54½. Describe that occurrence.

A. Billy and myself were surveying all around the dump the whole day—the forenoon—and we came down here. Billy came down to me and called me out, and says he, We have to go down to Deadwood. Billy was going down to see what kind of an arrangement we could make with them.

806 Q. 55. Were you there when the ground was measured?

A. I was not there when they were measuring. I came down here and we consulted who we would have draw up the deed for us—the three of us—and finally took it to this man here (showing).

Q. 56. General Dawson?

A. Yes, sir.

Q. 57. W-o took you?

Ans. We went in there and we were drawing out the deed. We commenced drawing it. We had some kind of a kick and Billy himself would not agree to it, and we came out and would not have anything more to do with it.
807 I was present in April when Mahan offered to make the deed to Gunn & me for our interests in the Bobtail. I was not there when the ground was measured. We went to Dawson'- office to have the deed drawn, but there was some kind of a kick, and would not have anything more to do with it. The next talk that Mahan, Gunn, & myself had about the Bobtail was in the fall of '77, when we started the tunnel. Gunn thought we could strike the Caledonia ledge and that if we'd strike that pay we might stand the Caledonia off. We went to work and were digging around when Mahan came up and asked us to come down and we would start the tunnel. The contract for running the tunnel was drawn in the Senate saloon. Gunn drew the first contract and Gibbon refused to sign it because, I believe Mahan wanted it to run as a Bobtail tunnel. There was an-

other contract drawn up which we all signed, under which we all went to work. Mahan said that he had been out a good deal on account of the Bobtail, and Gunn told me that we would work out our proportion of the tunnel.

808 I was present at the survey. The only stake that was pointed out by Mahan and Carey that I knew of was the northwest corner stake. Mahan and Carey pointed out this Bobtail shaft that was filled up as part of the work on the Bobtail to the surveyor, and Gunn and he then pointed out the tunnel as part of the work also. That tunnel was Clara No. 2 work as I always thought. All the Clara No. 2 owners paid for the tunnel. Mahan paid me in money over & above what he was out on the Bobtail. Gunn & I worked out our own interest. I was present when Kello made out the location certificates. They were put up there before the first survey's. I do not know who posted them. After the survey Gunn put up the two notices on the Clara No. 2. There were two candle-boxes put up there—one on Clara No. 2, and the other on the Bobtail. I was working at the tunnel at that time. I think Mahan drawed the notice up and posted them. I was not present when Mahan acknowledged his signature to the old deed made by himself,

809 Harrington, & Gibbons to Gunn for the work on the contract in '76 or '7. There was some trouble about getting it acknowledged. Billy used to go after that pretty often. They put it away from one time to another, and sometimes we would blame Mike Gibbons not coming down to acknowledge the deed; that is the way it went on for a long time between us.

Q. 115. Why were you trying to get it acknowledged?

A. I understood it wanted to be done—acknowledged.

Q. 116. It had to be done?

810 A. Yes, sir; the first time I learned that Mahan claimed the Bobtail was the latter part of April, '77. It was a good while after we began work on the shaft and on the occasion of Carey's visit. Mahan never told me in the winter of '77 or the fall of '76 that he had a bill of sale of the Bobtail from Ireton. I saw the Clara location notice up there, but did not see any Bobtail notice.

On cross-examination the witness further testified as follows:

I can neither read nor write. I could not tell by seeing a notice what notice it was, but I would know two notices if I saw them there. I sold my interest in the Clara to the Caledonia Company for $5,000.00 cash and $5,000.00 more if the Caledonia wins this lawsuit. If they loose I loose the remaining $5,000.00. When

811 Gunn & I sold out we asked at the rate of $50,000.00 for the whole mine. The Caledonia Company only wished to purchase only so much of the Clara No. 2 as conflicted with the Caledonia. We would not sell unless we could sell out the whole claim. The company objected because the ground was in litigation, and so we agreed to take our chances on half of the purchase-money. The $5,000.00 nor the whole Black Hills wouldn't make me swear to a lie; the square thing will always last the longest.

On redirect examination the witness further testified as follows:

I don't know whether the notice which I saw posted upon the claims with plats at the time I was working in the tunnel was patent papers or not; the time was after the first survey.

812 JAMES LYNCH was next recalled as a witness for plaintiff and testified as follows:

During the month of February and up to the 20th of March, '77, I was over the trail that leads from Lead City past the Bobtail discovery shaft twice a day, and during these visits I did not see any work done at the Bobtail shaft or cut or anywhere — 75 feet of it. The trail was a couple of hundred feet probably from the shaft.

On recross-examination the witness testified:

I did not see but one trail at that time. I was a plaintiff in this action at one time before I sold the Caledonia. I got between five & six thousand dollars for my interest. I have no interest whatever in the event of this suit.

813 JOHN MANNING was then called as a witness on the part of the plaintiff and testified as follows:

In December, '76, or the 1st of January, '77, I first bought into the Clara—bought 100 feet. I spoke to Mahan about the purchase; he said he thought it was a pretty good property. I made another purchase of 200 feet in February, '77. No objection was made by anybody to my buying that interest. Mahan told me that I had better purchase that other 200 feet. I asked Thomas F. Mahan if there was any conflicting title on the Clara ground. He said he thought it was all straight. That was on the 14th or 15th of February. In the spring of '77 the Clara owners went to work on the mine. I bought a wheebarrow, some hose, stove-pipe, and a little sheet-iron stove for the mine. The first I heard of the Bobtail was after that, when they drew up the contract on the Senate to run the tunnel. The Bobtail was spoken of and Gibbons threw down the pen and said he would be damned if he would sign any Bobtail.

814 Mahan said that he had purchased a title called the Bobtail; that they should have an interest in it if they did work to amount that he was out on it; that was the way I understood it. Mattie Moore said to hell with your Bobtail; there is no such thing, or something to that effect. Mahan said that he had purchased the Bobtail to protect the Clara. The agreement that we were speaking of was that I was to pay my share of it, and they were to work their share out on this Clara tunnel. This tunnel was known amongst ourselves as the Clara No. 2 tunnel. I did not hear any more about the Bobtail until a little while before I sold out to John Mahan. I paid $70 or $80 to Billy Gunn, on an order from Thomas F. Mahan, for work done on Clara No. 2, but I do not know whether it said tunnel or not. (Here witness was handed a paper purporting to be

a copy of the order, and said his recollection was that it was for that amount, but that he did not remember the exact phraseology of the order.)

815 On cross-examination the witness further testified as follows:

I took an active interest in bonding the Clara to Farrish. Mahan would not bond his interest in the Clara unless he also bonded the Bobtail. I went up one day with a pistol for the purpose of driving the men off of the Bobtail.

On redirect examination the witness further testified:

That occurred after this contract was completed on the Clara No. 2 tunnel.

Plaintiff's — introduce in evidence the copy of the order referred to, which reads as follows:

$71.65. Mr. John Manning, please pay to the order of Wm. Gunn $71.65, and charge the same to me, for work done on the Clara No. 2 tunnel.

Yours respectfully, THOMAS F. MAHAN.

Deadwood, D. T., February 21st, 1878.

(Signed) THOMAS F. MAHAN.

Received payment.

WILLIAM GUNN.

816 ROBERT COOPER was then called as a witness on the part of plaintiff and testified as follows:

In the months of Dec. & January, down to the 19th of February, 1879, I was working on the Queen of the Hills & Grand Prize. Thomas F. Mahan and John Noonan, the defendants in this case, were interested with me in the Queen of the Hills. I do not know when I first heard from Mahan about the Bobtail. I heard from other parties before I heard from him, some time in August or September, '77. The first time I ever saw a Bobtail stake was when they made their survey, the first of January, '78. Two or three days after that survey I saw a north centre end stake and a tree marked on the northwest corner and the west side line centre stake. I had seen this northwest corner tree in January or Feb., '77. I did not notice anything on the tree at that time. After the survey by Kello I saw this tree again. It had a fresh blaze and fresh writing on its east side. The north centre end stake of the Bobtail was a stake, I think. I do not recollect of seeing that north centre end stake in '76. I do not know that I was right at the particular place where I saw the west side centre stake after the survey during '76, but if there had been a stake there I would have seen it whilst passing.

817 I was familiar with the ground where the Clara No. 2 shaft and the Bobtail cut or shaft were in January and up to Feb. 19, '77. I was in that neighborhood on the 12th of M'ch following, but did not notice any change in the ground. There might have

been a day's work or two done and *my* not notice it. Except the surface cuts and little holes, there was no work on the Bobtail, and had there been any fresh works on the cuts or holes in February or up to March 20th, '77, I would have seen it, particularly if there had been snow on the ground. I never heard of any work been done there prior to the time the Clara No. 2 boys went to work until this trial. I objected to their making this survey on the Bobtail. Kello called Mahan over, and Mahan said that he did not wish to interfere with me in the Queen of the Hills—in any way, with the Bobtail; that he had deeded me my interest there, and would protect it, or something to that effect. I then allowed him to go on and make the survey. Just after the excitement about the location of claims the Clara No. 2 notice was put up. I cannot recollect seeing any notice on the Bobtail until they made an application for a patent in the spring of '78. Cariso and Quinn worked for us in December, '77, at a point about 247 feet north and east of the Caledonia discovery shaft; that was Queen of the Hills work,
818 and it was distinct understood between Delaney, Mahan, and myself that it did not apply to the Bobtail. This work was done by Cariso, Queen, and another man. I kept their time in a time-book brought me by Mahan for the purpose and gave one of them our order on Mahan for *his* pay. During none of my examinations of the south end of the Queen of the Hills in '76 and spring of '77 did I ever see any of the Bobtail stakes. I know a little hole in the ravine that runs right down by the Queen of the Hills shaft; I saw it very often in '76 and down to April '77, but never saw any east side centre stake of the Bobtail there. I saw the Bobtail discovery tree that was cut down; I saw it some time in the Spring of '77. I do not think I ever looked for any inscription on it—was not aware at that time that there was any Bobtail. I saw the fort on Clara Hill about the 12th of March, '77. There was no fort built there up to the 19th of February. I think that fort commanded a view of the Clara No. 2 works and this Bobtail discovery.

819 On cross-examination the witness further testified as follows:

At times I have not been very friendly with Mahan since December, '77, when I stopped the survey. I might have used some threatening language. I am positive this cabin called the second fort was there on the 12th of March, '77.

820 JOHN MAHAN was next called as a witness for plaintiff and testified as follows:

The order given by Thomas F. Mahan on John Manning for work done on Clara No. 2 tunnel was drawn by John Maclay in my presence in the sheriff's office and read to him. To the best of my knowledge, Mahan signed it right there. I afterwards put the order in the safe; I subsequently gave it to Judge Murphy or John Manning, I don't know which; I never saw it afterwards.

On cross-examination the witness further testified as follows:

I am interested in the result of this suit to the extent of $5,000.00.

821 J. M. MURPHY was next recalled on part of plaintiff and testified as follows:

I got the order of Mahan on Manning when the deposition of Manning was taken; attached it to the deposition as an exhibit; and it, together with the deposition, have been burned up, so far as I know. Witness was here handed what purported to be a copy of the order referred to, and stated that, to the best of his recollection, it was correct.

822 WILLIAM CLAGGETT was then called as a witness on the part of plaintiff and testified as follows:

I examined Manning when his deposition was taken. I saw the Mahan order very frequently; I had it in my possession when I took the deposition and had it attached as an exhibit. I told the notary to make me a copy of the deposition of Manning for the express purpose of preserving this exhibit. I took this paper, which I hold in my hand, and went the Liverman's office and compared that exhibit with the original, word for word; it is an exact copy, even as to the form in which it was written.

823 WILLIAM GUNN was next recalled on the part of plaintiff and testified as follows:

There were 3 contracts on that tunnel altogether, and that order from Mahan on Manning was given in complete settlement for all that work up to date. Previous to that Mahan paid all that was due on his portion of the work up to that time. He generally paid us up as we completed the work; I never paid my proportion of the expenses on the Bobtail.

824 MICHAEL LYNCH was then recalled on the part of plaintiff and testified as follows:

From the 15th of February until the 20th of March, '77, I had been on the trail at the head of Shoemaker gulch 3 or 4 different times. I was acquainted with the Bobtail discovery cut or shaft in in '76, and I saw it in January, '77. I knew the condition of the Clara No. 2 shaft in January, '77. There was no work done at the Bobtail discovery during the month of Feb. and down to the 20th of March, '77. I saw the Clara No. 2 relocation notice posted to the south of the shaft on the 16th of March, the day after it was put up. I did not see any Bobtail notice. If there had been any there I would have seen it. I was on Clara hill when Ireton came there in September, '76. Ireton remarked that he had had the Bobtail claim there and had abandoned it. Mahan began to work on the Clara No. 2 the 6th of July, '76. Before he began to work there there was a small hole where the Clara No. 2 shaft was sunk, and to the north

of that there was a cut run. The cut run by Mahan after-
825 wards was run right through the hole. The cut that he run was about 10 feet wide, and ran about 20 feet to the east. I advised him to run the cut. I do not know when Raborg & Coleman worked up there. I know where the stakes of the Bobtail was stuck after the Kello survey. In '76 I was at a place where the southeast and southwest corners were established by the survey. I did not see them there in '76. I searched around for stakes where the south end of the Bobtail is now, in January, '77. I saw no Bobtail stakes there. After the Kello survey, in passing over one day to the Caledonia, I pointed out the northwest corner stake of the Bobtail to Tom Hanley. This was in March or April, '77. I was taking him down to show him the stakes of the Caledonia No. 2, which I had previously located, and we passed within 25 feet of this west corner of the Bobtail. I do not think he advised me to cut it down. I never was on the ground with Hanley prior to the spring of '78. I saw the Bobtail big dead pine tree stake, I think, in October, '77. There was writing on it, which I considered had been done that summer. I know where the west side centre stake of the Bobtail was established by the Kello survey. I use- to pass frequently in
'76, and prior to the survey, but never saw any stake down
826 to that time. That stake stood about 15 or 20 feet of the old trail, and was in sight from the trail. At the time I located the Caledonia I made a close search for stakes in that country, but saw no Bobtail stakes. I was up there at the time that the fort was built. The cabin was built, to the best of my knowledge, from the 20th to the 26th of Feb, '77.

On cross-examination the witness further testified as follows:

I think it was the first of October, '76, when Ireton came up there. There was 13 or 14 of us armed with rifles; there was not much over a quart of whiskey there. I believe Ireton was halted. I think Tom Mahan halted him, and so was Goddard. Ireton came there to make peace. The second fort was built in Feb., but I do not know the exact day. I have got 1,000 shares of stock in the Caledonia. I staked the Caledonia the 20th of June, '76, and I searched for the stakes about a week afterwards. The Bobtail had, or at least the Empire had, a discovery stake immediately on the south line of the Caledonia. They claimed 1,500 feet from the Caledonia ground.
This was the only stake that I found near the Caledonia as I
827 staked it. I did not see the south end centre stake of the Bobtail during the year '76. I know where the south centre end stake, as established by the Kello survey, is. I did not see that tree in '76. The trail that I traveled passed quite close to that tree. I saw the tree in '76, but did not see the notice on it. I did not suppose that portion of the ground conflicted with the Caledonia at that time, and I did not make any close search there. I saw that stump marking the south centre end of the Bobtail in January, '77, and I saw the northwest corner some time in the fall of '77.

On redirect examination the witness testified:

The stake that I have been testifying about as the south centre end of the Bobtail is a big pine stake close to where the southeast corner of the Bobtail is now. I do not know that that is the south centre end stake of the Bobtail. I simply spoke of it as being so-called.

828 J. G. MACLAY was next called as a witness on the part of plaintiff and testified as follows:

In the month of February, '78, I was keeping books for Manning. I do not remember anything about an order drawn by Thos. F. Mahan on John Manning for some work on the Clara No. 2. Manning or Mahan, one or either of them, paid Tommy Mahan some money for work done on the Clara No. 2, and I made cash-book entries to that effect. I do not know what time that was. The books were destroyed in the fire.

829 G. W. MCCLURE was then called as a witness on the part of plaintiff and testified as follows:

I first became acquainted with the neighborhood of the north end of the Bobtail claim in the spring of '78. I know Jeremiah Cariso. About the 10th of Feb., '78, I saw him and another man at work on Queen of the Hills ground 2 or 3 hundred feet, I should judge, north of the Caledonia discovery shaft, and right on the line of the Caledonia and the Queen of the Hills. They had just broke ground the day before for a tunnel on what I understood was Queen of the Hills ground.

On cross-examination the witness further testified as follows:

I am foreman of the Pierce mine. Mr. Rigby is my superintendent.

830 PETER A. GUSHURST was next recalled on the part of the plaintiff and testified as follows:

I know where the Clara No. 2 shaft is. I knew all the workings within 50 feet of the Clara No. 2 in the fall of '76. There was some work done on the Clara No. 2 in the spring of '77. I saw Mike Gibbons and Mahan at work there. Mahan was straightening out the dump. There were also two or three other men at work there at that time. Prior to that time I had seen no change in that locality at all from what it should — in '75. After the Kello survey there was a stake pointed out to me as a Bobtail stake, which I judged to be the north centre end stake.

831 CHARLES E. CARNEY was then called as a witness on the part of plaintiff and testified as follows:

From the 15th of Feb. to the 20th of March, '77, I was over the train that runs right by the Clara No. 2 shaft about five times a week. I know of the Clara No. 2 boys sinking a shaft and cutting

away the dump, but I cannot fix the date. Gibbons was one of them. Before Gibbons came to work there I saw no work done in that neighbor-ood during the month- of February & March, '77, nor within 20 or 30 feet of the Clara shaft. I do not remember of seeing any notice there in the spring of '77. I knew the tree that is claimed to be the northwest corner of the Bobtail in October, '76. I saw it again in the spring of '77, before April. I think I saw writing on it in the winter of '77 & '8. I saw no blaze upon prior to that time. It was about the only stub or tree there was writing on there. Prior to Dec., '77, I use- to see that tree once a week or oftener. If the blaze had been put on that tree in March, '77, I think I should have noticed it there afterwards.

832 On cross-examination the witness further testified as follows:

I do not remember the time that I saw Mahan and Gibbons at work on the Clara, but think it must have been before the inauguration of President Hayes.

833 WILLIAM H. WORKMAN, was then recalled on the part of plaintiff and testified as follows:

The only work that I saw on the Bobtail discovery shaft or on the Clara No. 2, or in that immediate vicinity, between the 15th of February and 20th of March, '77, was the work that was done by Gibbons & Gunn on the drift. They came there, I think, in March, after the relocation excitement. I saw the Clara No. 2 notice posted by the discovery shaft. I saw no Bobtail notice. I never saw any change in that hole prior to the time that Gibbons and these parties came there to work. I don't think there could have been any work done there prior to the 20th of March without my having seen it. I know nothing of the Bobtail stake until after they made their survey. I know when they claimed the northwest corner. I saw it first in October, '76. I was at that tree with Cooper, I think, in Feb., '77, and did not notice any blaze or marks on it at that time. I saw the north centre end stake after the Kello survey had established it.

834 It was about 120 feet from the Oro Fino shaft. I was frequently in that neighborhood through the months of Feb. & M'r'h, '77, and never noticed any stakes until after he made the survey. I never saw a Bobtail stake until the time of the survey, in Feb. or M'ch, '77. I saw some of the stakes of the Queen of the Hills, Caledonia, & Clara No. 2.

Cross-ex.:

When Cooper and I did the shooting at the nothwest corner stake I should judge we were within 10 to 20 feet of it on the upper side. I cannot recollect whether we were shooting at the tree or not. My recollection is not very good.

On redirect ex. the witness further testified:

The fort near the end of the Queen of the Hills was built the last of February. I saw it while it was building. The south centre end

stake of the Queen of Hills was about 20 feet from the back end of the fort. The snow had blown off from the ridge running along where the fort was built into the hollow.

On recross-ex. the witness testified as follows:

I am certain that the fort was built the latter part of February.

835 HENRY LACKEY was then recalled on the part of the plaintiff and testified as follows:

I was over the trail by the Clara No. 2 several times in February and March, '77. I saw the Clara No. 2 notice posted up there in the spring of '77. It was posted in a box a little south of the back of the shaft, as near as I could judge. I remember a little cut that was about 20 feet north of the Clara No. 2. I saw no notice posted at that place in '77 that I remember of. I saw no Bobtail notice anywhere in that vicinity in March, '77. There was no work done from the 15th of Feb. down to the time that the Clara No. 2 boys went to work there on the Clara No. 2 shaft or within 25 or 30 feet of it. I should think I would have seen it if there had been any work there. The fort was built up on top of the hill over the Clara No. 2 shaft as near as I can remember. It was built some time in February, '77. I helped to build it. Tommy Mahan was there. I know where the Bobtail ground is claimed to be. I was around there in '76
836 where the northwest corner is claimed to be. I saw no writing or blaze on that tree in '76 that I know of.

On cross-examination the witness further testified as follows:

I own seven hundred and eighty-old shares of the Caledonia stock. I don't know whether I was one of the original plaintiffs in this suit or not.

837 WADE PORTER was then called as a witness on the part of plaintiff and testified as follows:

I had a talk with Ireton about the Bobtail about the 10th of March, '77, in South Bend. He said that he had given it up—had not done the amount of work.

On cross-examination witness further testified as follows:

I knew Ireton had a location called the Bobtail, because I was around there when he located it in '76.

838 A. J. RIGBY was then recalled as a witness for plaintiff and testified as follows:

On the 16th of this month I made measurements of the Bobtail work, assisted by Mr. Babcock and Mr. Ault. I first observed the excavation that is known as the Bobtail work on the first of September, '78. There was work done there subsequent to the time that I took charge of the Caledonia mine. I was present when the Bobtail shaft was uncovered. The shaft is some 5 or 6 cubic yards.

When I first saw the ground in '78 there was a slight excavation north of the Bobtail discovery shaft commencing at the road and running towards the hill. It would be about 10 feet in depth towards the hill, about 5 feet in height and equal to about 8 or 10 feet in length north and south. The most of the material in which that work was done is loose rock. There is at present some rock in the back part that we would call picking and gadding ground, but not blasting. There has been no blasting ground encountered in that work. Taking the entire excavation of the Bobtail it
839 would not cost to exceed one dollar and twenty cents per cubic yard to excavate it, estimating wages at $3.50 per day. Estimating wages at $5.00 per day it would cost, perhaps, one dollar and forty or, perhaps, fifty cents. In Feb., 1879, when the ground was frozen 3 feet deep, I excavated 46⅔ cubic yards equally as hard, for the sum of $42.00. This work was done about 250 feet north of this Bobtail work and near the south end of the Caledonia mine. No tools were used except a pick & shovel, and I gave the men who did the work the poorest tools we had about the mine and paid them $3.50 a day. I had this excavation made for the express purpose of testing the question as to the value of all the work done on the Bobtail at and near the discovery shaft down to February, 1879. There was no difference in the material in the Bobtail excavation and the one I had made except that in mine the ground was frozen 3 feet deep. When this discovery shaft was dug out we reached the bottom and, I think, there was rock taken out that never had been moved before to the extent of 6 or 8, or maybe 10, inches.

840 Plaintiff next introduced in evidence the deposition of HENRY S. IRETON, dated October 10th, 1878, which is as follows, to wit:

To the introduction of which the defendant, by counsel, objected on the ground that the same was incompetent, irrelevant, and immaterial, and not proper rebuttal, which objection was overruled by the court. In accordance with the suggestions of the court and consent contained in page 25½ of book 1 of this bill of exceptions, and to save the point as there provided, the defendants excepted.

The Bobtail claim was located the 24th of Feb., '76, by myself, Thomas E. Carey, and Daniel G. Chizum. I made a deed of my interest in the Bobtail to Mahan in March, '77. It was dated on a different date from that on which it was signed at Mahan's request. There was another contract drawn up between us at the same time, which was left for safe-keeping with Judge Murphy, and was burned in the Gayville fire. This contract was bearing on the deed. Mahan was to pay $150 at any time previous to the first of October, '77, if he sold the claim, and if not sold by October the first
841 he was to pay me the $150 or the deed was to be null and void. Mahan did not pay me the $150.00 on or before the first of October. I never had written power of attorney from Chizum to dispose of his interest in the Bobtail. He gave me verbal authority to sell or do as I pleased with his interest, as he would not do any more

work on the claim, and by right his interest reverted to me. I disposed of his interest to Mahan at the same time with my own. I considsidered Chizum's interest forfeited, and at Mahan's request signed his name to the deed. The deed bears date Dec. 6, '76, but its actual execution was on a Sunday in the month of March, '77. It was dated back at Mahan's request to Dec'r 5th, 1876. I had no reason myself for dating it back, and Mahan gave no reason for doing so. I made a deed to George W. Wells of my interest and Chizum's in the Bobtail on or about the 25th of Feb., 78. I delivered the deed to Dr. Welch for Wells. I made the deed to Wells, because I considered the sale to Mahan null and void for non-payment. I acknowledged the deed to Mahan before A. R. Z. Dawson on or about the 12th of August, '78. After I acknowledged my signature Mahan paid me $100. Before signing the deed to Mahan I had abandoned the Bobtail claim. When we located the Bobtail the north-
842 east corner stake was a pine tree blazed, and there was a stake on the northwest corner. Those stakes were never changed by me. There was no tree or tall stump at or very close to the northwest corner of the Bobtail. In the month of Sept., '76, I stated to John Flaherty, Thos. F. Mahan, Jack Dawson, Bill Freanor, and some others that I had abandoned the Bobtail.

On cross-examination the witness further testified as follows:

The Bobtail was discovered on the 21st of Feb., '76, by Carey, Chizum, — myself. We discovered quartz rock and found some little gold in it. We located, set 3 stakes on the south end corresponding with the 3 north end stakes of the Gold Run, then measured it 1,500 feet north northeast; then we made two stakes and a tree across the north end. I don't remember whether there was any side stakes or not, nor can I tell whether the claim was 300 or 600 feet wide. We blazed a tree when we found the croppings, giving notice by written notice on the tree how far it run, so many
843 feet north and so many feet south. The northeast corner was marked by a live pine tree about 12 to 14 inches in diameter. The north stakes were made out of pieces of dead limbs and stumps. Carey and myself did the setting. We marked all the stakes and wrote on them what place they represented on the claim. The claim was recorded about two days afterwards with Parker the quartz recorder of the district. The discovery was from 250 to 275 feet north of the south line of the location. Before the 1st day of July, '76, there were altogether about $140 worth of work done on it, which consisted principally of sinking a shaft. I did a portion of it myself and Raborg & Coleman done the balance for a certain interest in the claim, but which they voluntarily forfeited. About 5 or 6 days after the location of the lead Carey conveyed his ⅓ interest to Chizum and myself for 100 feet in a placer claim. Carey worked one day on it after the discovery. Chizum gave his ⅓ interest to me and told me to do as I pleased
844 with it. I first made a conditional conveyance to Mahan and secondly a conveyance to Geo. W. Wells. The conveyance to Mahan was in writing and witnessed by Thos. Carr and a man

named Watts or Waters. The first portion of the $150 that Mahan paid me was when I made the demand upon him about the last of October or first of November, '77, when he gave 2½ ounces of gold-dust, which I sold to the bank for forty dollars. Immediately after acknowledging the deed—in about 5 or 6 minutes—he paid me $100. I do not know whether the other contract between Mahan and myself was witnessed or not. It was made at the same time and place as the deed. Some time in the latter end of June, '76, I saw a stake about 5 inches square and 4 or 5 feet long lying by my shaft on the Bobtail with a notice written on it giving notice of the location of Clara No. 2, and I also saw work done there. On the 9th of June there were parties there who done some work. The discovery
845 stake of the Clara No. 2 was within the lines of the Bobtail. I never saw any Clara No. 2 boundary stakes. I remember being at the fort on Clara Hill in September, '76. Mahan, Treanor, Dawson, & others were there and were all around. I went there as a *piece*-maker between the Giant parties and them. There were a few words said in relation to the Bobtail. I stated that I had not done sufficient amount of work on the claim and that some parties had jumped it, and that I was not going to bother about it, or words to that effect. Some of the party remarked that that was so. There were no threats as to me, but there was to other parties; they gave me their bottle to take a drink, and I did so. I was not apprehensive that any of them would shoot me knowingly. I had some apprehensions that I might get hurt accidentally, in case they would get into a fight and get to shooting. My reason for saying I had abandoned the claim was because I had lost faith in the mine. I did not think it would pay. I had abandoned the claim, but I do not know whether I had forfeited or not at the time I sold out to Mahan. Judge Murphy told me that the deed to Mahan was forfeited because of its not being acknowledged and because of non-payment. I had counsel with him. He and Welch paid me $100. Murphy & Welch came to my residence in Central City in Feb., 1878, and asked me what I would take for my interest in or a deed to the Bobtail. I do not remember whether Murphy asked me if Mahan had paid me the money due on the sale of the Bobtail.
846 The inducement they offered me to sign the deed to Wells was the money. I told Murphy at the time that there was still $100 owing to me from Mahan. The deed to Wells was drawn and executed in Murphy's office about 45 hours after that conversation. The agreement to pay me $100 was entered into before I made the deed to Wells. I don't remember whether I asked Murphy if the transaction was all right. They both paid me the $100—Wells giving me $25 and Murphy $75. I had in my possession on the 12th of August, '78, but do not know where it is just now, an affidavit from John M. Murphy giving the facts of the contract and deed between myself & Mahan. It was made after I signed the deed to Wells. I required Murphy to give me an affidavit of the facts in regard to this contract. They knew about my prior conveyance to Mahan and of its being on the quartz district record.

847 FREDERICK A. BABCOCK was next called as a witness on the part of the plaintiff and testified as follows:

I assisted Mr. Rigby in making certain measurements in the Bobtail excavation and verified their correctness. They sunk down about two inches below the bottom; the ground was what we should call loose rock and dirt. The face of the cut at the present time is in quite solid material; as far as the digging itself went it was apparently loose rock and dirt. I saw no difference in the character of the country where the excavation is as compared with that 40 or 50 feet to the north. I saw in one place in the excavation the marks of a drift; there were two old drill holes, evidently put in there exactly in the face; that was 4 or 5 or 6 feet directly behind the Bobtail shaft; a man can remove 3 yards of that kind of material in a day. I think two men ought to sink that hole from the surface down to the depth at which I saw it when uncovered inside of 3 days. The diagrams marked "A" & "B" give the number of
848 cubic yards in these several holes. The excavation pointed out to me as Bobtail work at the place of discovery shaft contained 88.83, and another piece on the bank, which I call a gouge, 4.66 cubic yards.

On cross-examination the witness further testified as follows:

I made my measurements and survey according to the dividing line between the Bobtail work and the Clara No. 2 work pointed out to me by Mr. Rigby.

849 JOHN DAWSON was then called on the part of plaintiff and testified as follows:

I became acquainted with the Clara No. 2 on the 6th of July, '76. At that time there was a hole immediately above, vertically, where the Clara No. 2 shaft is now. It was about 3 feet deep. Mahan came up there on the 5th of July, put up a location notice, and sunk this hole probably between 6 & 7 feet. He then went back and run in an open cut. I was at work on the Clara No. 1 shaft, and in sight of the Clara No. 2. I know the work that was done on the Clara No. 2 in the spring of '77, and know where the Bobtail discovery shaft is. In March, '77, I saw Billy Gunn, Mahan, Gibbon, & Moore grading back from the north side of the cut to the Bobtail discovery shaft. They filled up the Bobtail discovery shaft. The old trail in '76 & '7 ran within 3 or 5 feet of the Bobtail discovery shaft and to the west of it. I first saw the northeast stake of the Gold Run on the 24th of April, '76. It was a pine stake partially rotten on the outside
850 and placed in a mound of rock. The inscription on it was "Northeast corner stake of Golden Run lead, 300 feet from crevice." That stake remained there until about the 20th of July, '77. I then missed it for the first time. The mound of rock was removed from its original place about New Year's, '78, and a new monument for the Rothchild lode was built up close by out of the rocks by which the Gold Run stake had stood. I broke up a small birch peg, about 18 inches long, and stuck it in the hole where the Gold

Run stake had stood, and I pointed [it] out to Surveyor Rohleder in April, 1880. I put this peg there as a mark for myself to know the exact place where the old stake stood. I never saw any Bobtail stakes there by that end of the Gold Run. I saw the Bobtail discovery stake or tree in '76. It was a straight pine tree with no limbs of any kind, and broken off at the top about 18 or 20 feet. I saw it last before it was cut down, about the time of this rerecording business. I first saw it about the 18th of May, '76. It had then written on it, "This tree shall be the taken as the discovery of the Bobtail." There was [no] writing underneath that notice, except the initials of Carey, which was the last name. The writing was tolerably legible. The writing was on the east side, and the blaze was, I should judge, nine inches long and not over two inches wide. There was no Gold Run notice on that tree at that time; that was the only Bobtail stake I saw in '76. The next time I saw a Bobtail stake was early in '78, a day or two after Carey, Mahan, & Kello were looking at the northwest corner stake. I
851 went over and looked at it and saw the inscription on it. I saw them go over to it, Mahan in the lead. I know where the southwest corner of the Bobtail is now, but I never got myself sure as to the southeast corner. From about the first of June until the last of July, '76, I was all over the immediate neighbor-ood of where the southwest corner is almost daily. I was on Clara Hill at the time Ireton came there in Sept., '76. He stated that he was the discoverer of a claim right over the hill called the Bobtail; that he had failed to do the required amount of work on it; that he had given it up, and other boys had located it, and he did not ever calculate to do anything about it. I was present this spring when Chizum pointed out some of the stakes of the Gold Run. I made some suggestions to him as to this northeast Gold Run stake. That was after he had pointed out the south centre end of the Bobtail. He then pointed out the southeast corner, the south centre and the discovery tree, and the north centre of the Bobtail without
852 suggestion from anybody. On the 24th of February 10 or 12 of us went up on Clara Hill and built a fort. We completed it, I think, the same day. Mahan and Frank Coyle, I think, slept there, but I don't know. I was up there again a day or two after the 25th. I was there on the 27th or 28th sinking a hole on the Elethea. Mahan was not at work on the Bobtail at that time. I was very often over the trail by the Bobtail discovery between the 27th of Feb. and the 20th of March, '77. From the 26th of Feb. down to the 15th of March there was no work whatever done in the neighbor-ood of the Clara shaft or Bobtail discovery. I saw the supplementary Clara No. 2 notice a few days after the excitement posted up on the claim, but did not see any Bobtail notice.

853 On cross-examination the witness further testified as follows:

Chizum was not correct when he stated that *on* last April I pointed out to him the place where the southeast corner stake of the Bobtail stood in 1876. I was there in May, '78, when Mahan, Flaherty, Pear-

son, Ingoldsby, Jack McMasters, and McEntyre came up and asked me if I knew where the Bobtail stake was. I told them yes. They said they wanted to find the north centre end stake of the Gold Run. I did not point *it* out to them the north centre stake of the Gold Run. I pointed out to them the Bobtail stump. They said that was the same tree; that the Gold Run notice was on one side and the Bobtail on the other. I did not point out to Pearson the supposed north end of the Bobtail. I pointed out to him a stump, and Chizum said it was the north end. I never knew this was the north end stake of the Bobtail before Chizum pointed it out to me.

854 The deposition of FRANCIS COYLE was next offered in evidence by plaintiff's counsel, which is in the words and figures following, and to the introduction of which the defendant objected on the ground that the same was incompetent, irrelevant, and immaterial, and not proper rebutting testimony; which objection was overruled by the court. In accordance with the suggestions of the court and consent contained on page 25½, book 1, of this bill of exceptions, and to save the point as therein provided, the defendants except.

I was present at the location of the Clara No. 2. It was located about the first part of June, '76, by Mike Gibbons, Murphy, Griffin, and Jim Grant. The notice was written by Grant and dictated by Jack Dawson. It was written with a pencil on a piece of stake. The location was called the Neptune at that time. There was a little cut on the ground and also a small-sized shaft alongside of the trail. The cut was 8 or 10 feet long and ran up into the hill. It was 3 or 4 feet deep and about 3 feet wide. The shaft was about 2 or 3 feet deep and about 3 or 4 feet across and about 30 or 40 feet from the cut.

855 That was all the work I saw there. The shaft was sunk in loose ground; the cut was in loose ground, but had a few quartz boulders in it. There was no solid formation disclosed in either the cut or hole; there was some mineral-bearing float thrown out of them. The stake that the Neptune notice was written on was about 3 feet long and flat on one side. The stake was lying on the ground at the mouth of the cut when Gibbons picked it up and said, This will do. I do not think there was any writing on it. I did not see Grant, to my knowledge, cut or erase any writing from that stake. To the best of my knowledge, there was no more than 4 or 5 days' work done there in all, and was not more than $20.00 in value. The Bobtail location notice was written upon a dry tree about 40 or 50 feet from the Clara No. 2 shaft. I could not tell what the notice contained further than the Bobtail location notice. I saw one Bobtail stake in a northeasterly direction from the Clara No. 2 shaft the day the Queen of the Hills location was made.

856 Thomas Mahan was with me. Those were all the Bobtail stakes I saw. I don't know who did the work on the Neptune location. I first saw it on or about the 27th of April, '76. The Clara No. 2 shaft was within a very short distance of the cut and a little up the hill from it. During the months of June and July, '76, Mahan run a cut into the hill and started to sink down on

what is known as the Clara No. 2 shaft. The cut was about 8 or 10 feet wide and was driven in about 15 feet to where he began to sink the shaft, and was 8 or 9 feet deep at the end or fan. At the end where he started to sink the shaft he struck a kind of ledge or solid rock. When he started to run the cut the ground was broken a little, but it was not broken when he began to sink the shaft. I do not recollect of seeing Grant or any of his partners doing any work there or in that vicinity from the date of the Neptune location until the time that Mahan went to work. The only work that I know of was on the day of the Neptune location, when the
857 locators of the Neptune picked around a little to get some rock to get assayed. Prior to the time that Mahan run that cut there was no solid or shooting rock, such as I would call rock, in place exposed in any cut or hole in the vicinity of the Clara No. 2 shaft. I never saw a Bobtail discovery stake or notice other than that on the dry tree; if there had been one I think I should have seen it. In the month of September, '76, I heard Iron state on Clara Hill that he had abandoned his right to the Bobtail, and did not intend to bother the owners of the Clara No. 2 any about it. All the reason that he gave was he had not complied with the law. I was present when the Clara No. 2 was located; when Thomas Mahan came up to work on it he gave it the name of Clara No. 2. Mahan said that Murphy and Griffin had given up their interest to him and James Harrington, and that he was going to work upon it, and was going to put up a new notice on it, which he did, putting his own name and that of James Harrington in the place of
858 Griffin and Murphy, as it was on the Neptune. I do not know the exact date, but it was in the neighborhood of one month after the location of the Neptune.

On cross-examination the witness further testified as follows:

I first went to work on Clara Hill on the 27th of April, '76, but did not work there steady for a couple of weeks afterwards, and passed over the ground where the Neptune location notice was posted about that date. The cut at the Neptune location was about 9 or 10 feet long, about 3 feet wide, and about 3 or 4 feet deep at the upper end. The shaft was about 3 or 4 feet wide, 2 or 3 feet deep, and up the hill, in a northerly direction, a little from the cut. The material in the cut was porphiry and reddish quartz, and plenty of quartz boulders lying about the cut. The location notice of the Bobtail was written on the side of a dead tree from which the bark had fallen. I do not remember anything more
859 than the name. This tree with the notice on it was between the cut and the Clara shaft, about 40 feet from the cut, about 15 feet further from the shaft, and a little southwest of them. I think I can state positively that that dead tree was not the south centre end stake of the Bobtail instead of the location notice. There was no tree or stump as large as this standing nearer the cut and shaft. There might have been some little black stubs a little closer. The stake upon which was written the Neptune location notice was about 3 feet long, and, I think, flattened on one side.

It was found in the cut, and appeared to have been flattened with an axe. Men in placer mines in the Black Hills at that time were getting four dollars a day. The location of the Neptune was made at the cut referred to. I do not think that that stake has contained a location notice of the Bobtail mine at the time it was used for the Neptune, and will swear to that to the best of my knowledge. I made no examination of the stake more than to glance at it
860 when it was picked up and handed to Grant. I never saw any person working at the cut and shaft from the 27th of April until the Neptune location, about the first of June, '76. I think there was gold in the reddish looking rock that I saw there. I do not know whether the locators of the Neptune got the rock which they took to be assayed from the cut or shaft. They tried it and got a good prospect. Mahan run the cut of the Clara No. 2 into the hill only a few feet distant from the cut I saw on the 27th of February. Mahan commenced work at the edge of the old cut, but I do not know how deep in it he went. The old cut is where he made his dump. The new cut, or Clara No. 2 cut, is further into the hill. He commenced at the edge of the old cut and ran further up into the hill. There was no new cut made at the time of the Clara No. 2 location distinct and separate from the Bobtail cut. I do not think that Raborg and Coleman worked about that cut and shaft in May, '76, and if Ireton, Coleman, and Rayborg should swear that they did
861 so I would still think that they did not work there. I will swear that there was not $100 worth of work done there, to the best of my knowledge, at the time of the Neptune location. The reddish boulders of quartz that I saw at the Bobtail cut resembled some of the rock of the Clara No. 2. The Neptune location stake was posted at the north side of that cut. The Bobtail stake that I saw on the day when I went with Mahan to locate the Queen of the Hills was something like 500 or 600 feet in a northeasterly direction from the cut and shaft referred to. It was a tree with a chip taken out of it as a kind of a blaze, and was not quite so large as the one upon which the notice was written. It was 30 feet, more or less, in height, and from 6 inches to a foot in diameter. Mahan referred to it and said it was a Bobtail stake, but that it did not amount to anything, as the Clara No. 2 covered it. I did not read what was written upon it further than Bobtail, and did not know what stake it was.
862 Mahan did not say at that time, "If the Clara No. 2 holds against the Bobtail a location will hold here," instead of saying it is a Bobtail stake, but did not amount to anything, because the Clara No. 2 covered it. When Ireton came upon the hill in September, '76, we halted him, when Dawson cried out, It is Ireton; he is all right; and then we told him to come on. Some of our party were talking about the parties that were disputing with us and Ireton said that we should drop it; that he owned an interest in the Bobtail, and that they had not complied with the law, and would give it up. Lynch, Lackey, and Heffron were armed, and were owners in the Caledonia. Gibbons, Moore, Gunn, & Mahan were armed, and were owners in the Clara No. 2. All the parties gathered in that fortification were adverse claimants to the Bobtail ground, or part of it.

863 JAMES B. CARR was then called as a witness on the part of plaintiff and testified as follows:

I came to the Black Hills in the latter part of March or first of April, 1877. I am a brother of Thomas H. Carr, who was then the mining recorder, and was appointed deputy under him the same day of my arrival. I held that position until the 13th or 14th or 15th of May, 1878. I was for a short interval after my brother's death the acting recorder. I know of such a claim as the Bobtail. In May & June, 1877, and in March, 1878, just prior to the trial of the Emma & Homestake N-. 2 case, I examined the Whitewood mining records with reference to there being a supplementary notice of the Bobtail in March, 1877, upon the books of the district. I left here about May the 15th, '78. There was no one present when I made the first search in the books and I don't remember distinctly when it was. I made a search when Mahan was present. I saw the certificate of the relocation notice, which I wrote at Mahan's request—the supple-
864 mentary matter which *which* I attached to that location. After that location notice at his request, and on that the filing of C. E. Hanrahan—the 10th of May, I believe, 1877, but I cannot fix the time only by that fact—Mr. Mahan came into the office and called for a certified copy of the location notice of the Bobtail lead and supplementary record. I had knowledge then without looking at the books that there was no supplementary record of the Bobtail on my books. I told him this and he was not satisfied. We looked over all the index books in his presence and searched in vain; then he requested me to make out the location notice of the Bobtail lead and attach a supplementary record. I made out the location notice of the Bobtail, and when I was certifying to this location notice Mahan objected and desired me to insert this supplementary record before certifying. We had quite an argument over that, and I told him I would not certify it. If my certificate should appear after it, it might be construed that it was certified after this supple-
865 mentary record as well as this location notice, and that would be a certificate of something that was not on my books. Finally Mahan allowed me to go ahead; so I certified to the Bobtail, as it appears on record on book 1, page 2, of the records of Whitewood quartz mining district. I wrote the supplementary behind my certificate at Mahan's request. Mahan wanted to place that paper on the records of the county recorder. Books No-. 3 & 4 were indexed by me. The transfers & locations notices as they occurred in the book were all written in the same book as they were handed me for record, but the index was made out alphabetically. I was thoroughly well acquainted with books 1 & 2 and pretty well acquainted with 3 & 4. I am able to state that there was no record of the relocation of the Bobtail on those books. We originated a supplementary record which we could not find on the book, and I had—there was a common form in which they made the supplementary record, and I was very well acquainted with it, but Mahan did not desire
866 that perfect form, and at his request I made certain changes and attempted to perfect the location notice of the Bobtail

which — vague, and fixed it in no locality as we believed it at that time. Witness was here handed a burned paper, and stated that he had seen it on the 16th inst. in the office of Judge McLaughlin; that he found the word Thomas on it, and that it appeared to be in his own handwriting, but he could not swear to it. Witness was also handed paper, and stated, It is a substantial copy of what I wrote for Mahan at his request. I wrote for him about May the 10th, '77. He did not have that supplementary nor any supplementary record put on our records. In March, '78, I examined the books of the Whitewood mining district at the request of Mr. McLaughlin. I found no supplementary location in the books at that time of March, '77.

867 On cross-examination the witness further testified as follows:

McLaughlin asked me to make an examination for all the documents on record pertaining to the Bobtail, Queen of the Hills, & Clara No. 2. About that time there was a deed—a copy of the deed and the supplementary record—which was not on record; it was a deed of the Bobtail lode; I don't remember by whom, but there was one missing deed that you—referring to Mr. McLaughlin—said you had no copy of, and also questioned me about the supplementary notice. This was about the month of March, '78, prior to the trial of the Emma Homestake No. 2 case. I don't know that you had any connection with the Bobtail at that time. I returned here in March of this year in the employ of the Caledonia Company and at the request of the directory of that company I was to receive two hundred and fifty dollars a month for my time, and have been staying at Rochford. I cautioned parties not to tell where I was, upon the supposition, as I understood, that the Bobtail parties
868 would attempt to run in some *some* documents that were not just what they ought to be, and if they knew that I was here they would make out their case accordingly. My expenses from California to the Black Hills have been paid by the Caledonia Company; it pays my expenses here, and is to pay my expenses back if I should go. I was appointed deputy by my brother in the latter part of March or the early part of April, '77. After I arrived here I spent some days looking around for some mining property to invest in. S. P. Romans was in the mining recorder's office in April and May, '77; I believe he was a deputy; I assisted him some little time in comparing a copy of the records that he was making. That was my first experience in a recorder's office. I never did any clerking of any kind before that time. Judge Murphy was not in my brother's office; he had his office across the hall. I don't know whether he examined the papers or not. I could not positively swear whether he was the deputy or not, but believe he was.

869 JOHN M. MURPHY was then recalled as a witness on the part of plaintiff and testified as follows:

I have no recollection of there being any record made or filed in March, '77, of the Bobtail claim. I had not heard of the Bobtail at

that time, and would not pay much attention to it. In the spring of '77 I examined the books frequently with reference to locations, and have no recollection of seeing a supplementary record of the Bobtail claim made in March, '77. I do not remember of Mahan coming into the office and handing any location notice of the Bobtail to Thomas Bentley. The next day or so after the 23d or 24th of March the deed from Ireton to Mahan was made out. Mahan and Ireton came to the office one Sunday morning and requested me to make out some papers for them, and I made out the deed which has been introduced in evidence here. Ireton then demanded a contract to go with the deed. The deed was not signed at that time. They had some talk about the date of the deed. I told them
870 I did not think it would be legal any way, being delivered on Sunday; so they got it antedated back to December 5th. Mahan gave no reason why he wanted it dated back. I kept the contract for Ireton, and it was burnt up in the fire in August, '77. The terms of the contract were that upon failure to pay the amount of $150.00 by the first of October the deed would be forfeited. I do not remember which of the parties suggested that there should be a consideration put in it of $1,500.00; it was not my suggestion. There was no consideration between myself, Ireton, & Carey in regard to there having been any other conveyance or understanding prior to that by which Mahan was to get this title of Ireton's.

On cross-examination witness further testified as follows:

I presume that prior to March 15th, '77, I had seen this tree that has been talked about as the discovery tree of the Bobtail. I did not attend to my duties as deputy mineral recorder continuously.
871 There were a portion of the time that the records were in Mr. Carr's possession at his cabin. I had copied the first & second books prior to the 15th of March, '77, which included the record of the Bobtail. I had entire controll of the books from the latter part of December until the 20th of March. Between the 13th and the 20th of March there were several hundred supplementary notices filed. The notices would be filed and subsequently copied. Fully one-half were simply minuted, recorded, and afterwards the notice written up. In a great many instances the name of the lode was taken down and the name- of the parties in interest in it and filed away, and it would be recorded when it could be reached. When I say minuted I mean that the name of the lode, the name of the locator, and the parties in interest would be taken down on a piece of paper and filed away. Then it would be turned over to the recorder when reached, who would take the original notice, write the supplementary notice, put it on record, and sign it. It would not bear the signature of any party interested in the claim. Of the
872 notices so filed or minuted there had probably been 150 or 200 recorded in the book before I left. The supplementary notices were kept in pigeon-holes.

Redirect:

Mahan was not there on the 14th to hand in any claim. I did

not see him until the night of the 15th, nor did he in that night hand in any claim or pay for filing of any.

Recross:

Mahan came there with Gunn and the others to have his claim recorded. I took in all the papers and all the money that was taken in. James H. Carr was not there on the evening of the 15th. I did not know anything about the Bobtail lode at that time. I had copied the record of it, but did not know where the claim was.

Plaintiff here introduced in evidence a Bobtail location notice marked Exhibit "A," which reads as follows:

873 *Certificate.*

Filed May 10, 1877, at 11.40 a. m.

BOBTAIL LODE — IRETON, MAHAN, *et al.*

BLACK HILLS, *Feb. 24th*, 1876.

Bobtail Lead, situated on the left-hand fork of Bobtail gulch, Lost district, commencing at the north east end of Gold Run lead, running 1,500 feet northeasterly course from the place of beginning; discovered Feb. 21st, 1876; located Feb. 24th, 1876, by H. J. Ireton, T. E. Carey, D. G. Chizum.

I hereby certify the above is a true and correct copy of the original location notice of the Bobtail lead as said original appears of record in book 1, page 2, of the records of Whitewood mining district, Gayville, D. T.

T. H. CARR, *Recorder.*
J. B. CARR, *Deputy.*

The undersigned, being now fully desirous of more fully comply- with the laws of the United States, do hereby add this supplementary record to the said original notice of location to show present ownership and claim, and to cover any illegality that might attach to making mining locations upon an Indian reserva-
874 tion. Now, therefore, the undersigned, not waiving any right, hereby locate said above-mentioned claim known as the Bobtail lead. Said lead is situated on the left-hand fork of Bobtail gulch, now commencing at discovery shaft. I claim 1,500 feet in a northeasterly direction. We also claim 150 feet on each side of said discovery shaft, as said lode was staked on the 24th day of February, 1876. I also claim all the rights and privileges guaranteed by the laws of the United States, Territory of Dakota, and the local laws and customs of this district.

THOMAS F. MAHAN.

TERRITORY OF DAKOTA, } *ss:*
County of Lawrence, }

I, C. H. McKinnis, register of deeds within and for said county, in the Territory aforesaid, do hereby certify that the within and

foregoing is a true and correct copy of the original instrument filed in my office on the 10th day of May, A. D. 1877, at 11.40 o'clock a. m., and recorded in book (1) on page 144.

Witness my hand and official seal this 3d day of May, A. D. 1879.

[SEAL.] C. H McKINNIS,
Register of Deeds.
Per W. L. KUYKENDALL, *Deputy.*

875 TERRITORY OF DAKOTA, *County of Lawrence:*

In [the] District Court, First Judicial District.

CALEDONIA GOLD MINING COMPANY
vs.
JOHN NOONAN. } No. 121.

Bill of Exceptions.

Filed December 3d, 1881.
FRANK J. WASHABAUGH, *Clerk.*

Filed this 27th day of July, A. D. 1882.
B. S. WILLIAMS, *Clerk.*

Defendant'- Rebutting Testimony, Book 5th.

876 Rebutting testimony for defendant.

WILLIAM M. WARD was then called as a witness on the part of defendant and testified as follows:

Mahan did no work to my knowledge on the toll road from the mouth of Gold run to Lead City in the months of February and March, '77.

On cross-examination the witness further testified as follows:

I was over the road a good many times. I do not remember exactly the number.

877 THOMAS F. MAHAN was then recalled as a witness by defendant and testified as follows:

I did no work during the months of February or March, '77, of any kind or character upon the toll road from the mouth of Gold run to Lead City.

878 J. C. McINTYRE was then recalled as a witness for defendant and testified as follows:

I was on what is known as Clara Hill in the month of May, '78, for the purpose of making an official survey of the Gold Run and Giant lodes. I took with me on the ground Angus McMasters, Joe Ingoldsby, John Flaherty, John Mahan, Jack Dawson, Alexander Eugh, and J. B. Pearson. We all went to the north end of the claim, and the whole party was unanimous in naming the stump

which has been discussed here so much, which is a little south of the Bobtail discovery, as being the north end stake of the Gold Run. I asked each one of those parties that went with me where the point was, and Dawson pointed out that stump, which is something like 30 or 40 feet southeasterly from the Bobtail discovery.

On cross-ex. the witness further testified:

I did not ask Dawson anything about the Bobtail south centre end stake in connection of fixing the notice of the north centre end stake of the Gold Run, but it is my impression now, and I am quite positive, that he said that the location of the Bobtail was on one side of the tree and the Gold Run marking was on the south side of the tree. I did not take Dawson there; they were all sent up there, Mr. Dawson, I suppose, with the rest. I suppose it was by some one employed by the owners of the claim.

879 J. B. PEARSON was then called as a witness on the part of defendant and testified as follows:

I was on the hill south of the Bobtail discovery in the month of May, '78, along with John D. McIntyre, John Dawson, and others; went there for the purpose of showing them where I planted the stakes of the Giant lode. I believe Dawson on that occasion pointed out to McIntyre the north centre end stake of the Gold Run. I don't recollect hearing John Dawson say anything on that occasion as to where the north centre end stake of the Gold Run stake was. It was an old dead tree standing right alongside the trail, right hand as you go over the divide to Lead —. It stood about 15 or 20 feet south of the Bobtail discovery shaft. It was marked on the south side end Gold Run, and on the north side it was the Bobtail.

On cross-examination the witness further testified:

That dead tree was about 40 or 50 feet high at that time.

Re-ex.:

The second fort was built the latter part of March. I fix the time from this fact: They had driven off our men from the Giant, and I went down to Crook to buy a can-on to blow that first fort off and those that were in it, and I failed to succeed to buy the
880 can-on, and I came back. When I came back I saw the second fort built. I got back from Crook the day before Johinnie Slaughter was killed. He was killed the 27th or 28th of March. We compromised with the Clara No. 1 and Clara No. 2 boys about the first of April. We published a notice in the Black Hills Times on April 7th, '77. The parties were holding the first fort when I went after the can-on. I don't remember exactly when the first fort was built. I was gone after the can-on four days, and when I got back the second fort was built.

881 JOHN A. MCMASTERS was then recalled on the part of defendant and testified as follows:

I was on Clara Hill the time the second fort was built. It was

some time after the 18th of March, '77. I fix the time from the fact that my brother Angus came in on the same coach that Johennie Slaughter was killed on, and it was news to him when he arrived. Mike Gibbons came to our cabin directly after the funeral of Canty and stopped with us a few nights. He said he did not like to sleep in a cabin where a man was killed.

882 JOHN FLAHERTY was then called as a witness on the part of defendant and testified as follows:

I was at the second fort on Clara Hill when it was being built by Moore, Dawson, Lynch, and the others about the 14th or 15th of March, '77.

Q. 13. Was the fort built then, or where they building it?

A. Just building it; they had just finished that day.

Q. 14. What time was that, to the best of your recollection?

A. To the best of my recollection it was just about the 14th or 15th of March, '77.

Q. 15. What fixes the date in your recollection?

A. The date in my recollection is this, that I was over there also; I was over there and saw Mr. Grant, which was living over there at that time, and I came back from there; came back from Washington—then called Washington—and I came back that way and stopped there, and they were all, the most of the boys, piling rock around the cabin, as I called it at that time. I think it was about the 15th or 16th; it might have been the 14th or 15th; I won't be certain; along the middle of March some time. Ireton accompanied me in the September previous to the other fort up there. I heard no declarations made by Ireton upon that occasion regarding his abandonment of the Bobtail, and he kept very close to me all the time.

883 Q. 18. What was the appearance of the crowd when you went into the fortification that day?

A. I did not see anything wrong about the crowd.

Q. 19. Were they armed?

A. I saw lots of arms there, but nobody had ever draw-d any on me.

Q. 20. Did not draw anything on you?

A. No, sir.

Q. 21. Did they draw a bottle on you?

A. I happened to be the one that had the bottle myself—no, sir; nobody draw-d none on me.

884 HENRY H. FOSTELL was next called as a witness on the part of defendant and testified as follows:

In the latter part of March, 1877, I went up on Clara Hill with Flaherty to where the second fort was being built. There were 10 or a dozen men there. I do not remember seeing Thos. F. Mahan there at that time. I have no doubt at all but that it was after the 16th of March.

885 ROBERT MCCLARY was then recalled on the part of defendant and testified as follows:

The second fort on Clara Hill was built the latter part of March, '77. I was working up there until either the 18th or 19th, and I do not remember of seeing it up there at that time, although I was working within ten or twelve hundred feet of where it was built.

886 J. M. MURPHY was then recalled as a witness on the part of defendant and testified as follows:

I am acquainted with the handwriting of Thos. H. Carr. He was not in the recorder's office on the 15th day of March. I recognize his handwriting in the document which purports to be the relocation notice of the American No. 2 lode. I don't know in whose handwriting the supplementary notice on that document is in. This American lode No. 2 notice bears date, filed for record March 15th, '77, 2 o'clock p. m. Here witness was handed relocation notice of the Fairview, endorsed Fairview lode, filed for record March 15th, and said this notice of the Fairview lode purports to be signed by Mahler & Story. The original notice is set out first, then the supplementary one, signed by Mahler & Story, but not their handwriting. This also purports to be filed for record March 15th, '77, at 2 o'clock p. m. I did state yesterday that it was the practice of parties coming into the office to merely state that they wanted to file a
887 supplementary and that I made a minute of it or some memorandum, and then as soon as it would be reached this supplementary record would be recorded without the parties signing the supplementary and writing it out.

888 THOS. H. BENTLEY was next recalled on the part of defendant and testified as follows:

I think the title and first four lines of the American lode No. 2 notice, purporting to have been filed for record on the 15th day of March, 1877, by Thos. H. Carr, the mining recorder, is in Thos. H. Carr'- handwriting; the remainder of the writing is my own. Carr started it and could not finish it and handed it to me to finish. I signed Carr's name to it in the office on the 15th of March, '77, by his authority, as I was in the habit of doing. A great many notices that were filed for record on March 15th were not written on the day of filing.

889 JOHN BURROUGHS was then recalled on the part of defendant and testified as follows:

The second fort on Clara Hill was put up some time after the 15th of March, '77; at least I had never seen it before. I was living in Lead City at the time and use- to go over the trail most every week from there to Deadwood, and I don't think it could have been built until after the 15th. I did not see it there until that time after these records were being made.

890 J. C. MURPHY [was] recalled on the part of defendant and testified as follows:

The second fort on Clara Hill was built about the 20th of March, '77. I fix the date from the fact that I had been having timbers cut for Bailey's mill about that time and I traveled backwards and forwards there a good many times. I finished hewing timber thereon, I believe, the 14th or 15th of March and there was no fort or cabin there then.

891 W. K. HOWARD was then recalled on part of defendant and testified as follows:

I know when the second fort on Clara Hill was built. It was built after the 18th of March, '77. I fix the date from the fact that I went to work on the Racine Mill the 12th of March, '77, and on the following Sunday I passed over the hill, and there was no fort there then.

On cross-ex. the witness testified as follows:

I went over the hill to Gayville to do some work. I passed over the trail that goes down by the Clara No. 2; it was just about sunrise in the morning; the sun was just shining on the top of the hills. I did not see any fort there at that time.

892 IRA FORD was then called as a witness on the part of defendant and testified as follows:

I was running an arastra at the mouth of Gold Run in March, '77; stopped running it about the 10th or 12th; after that I was over Clara Hill pretty near ever day up to the 20th; during that interval I saw no fort there. I was coming up the gulch some 5 or 6 days, I judge, before Johnny Slaughter was killed and some one cried halt. I stopped and they asked me who was there. I told them and they said come ahead up to the fort. I passed that place two or three days before that and did not notice any fort there then; it was a kind of rude structure. I could see it plain from the trail. I might have passed by and not noticed it; it was higher on the hill than and southeast from the Clara No. 2 shaft. I did not go to the cabin which you called fort and I took the men to be hunters. I had not heard of the trouble.

893 CYRUS H. ENOS was then called as a witness on the part of the defendant and testified as follows:

I knew where the second fort was erected on Clara Hill in the spring of '77. It was near the south end line of the Queen of the Hills. The first time I saw it, I think, was in May, '77. I had been over that ground, I think, on the 7th of March, and passed close enough to where I saw the fort in May, but did not notice it. I fix the date of the 7th of March, from this fact. I arrived in Deadwood the 6th or 7th of March, and went over to Lead — next. I there fell in with Thomas Mahan; he was the first man I struck that I was acquainted with, and he went over to the Queen of the Hills with me.

894 C. F. THOMPSON was next recalled as witness a on the part of defendant and testified as follows:

The toll-road from Lead City to Deadwood was owned in the fall of '76, and the winter and summer of '77, by Mahan, Weber, & myself. In the winter of '76 & '7, there was an arrangement made with Ward, Ames, & May by which they were to keep the toll-road. In the fall of '76, or early winter, Mahan went down to cut a tree out of the road; that was the only work that I recollect of Mahan doing. I did some work in April, and at the time the Racine mill came in, but Mahan did not assist me. I remember the time that the second fort was built on Clara Hill. I think it was in March, '77. I should say it was two or three weeks after the time that I saw Mahan at work when I passed over the trail with John Burroughs, in the latter part of February.

895 WILLIAM A. BALDWIN was then called as a witness on the part of the defendant and testified as follows:

I know when the second fort was built on Clara Hill; It was after the 15th of March; I was running the Gunn tunnel at the time; I could see it from the trail. I use- to go up Gold Run. I say it was after the 15th of March because I had the Orleans mine recorded on the 15th of March at 12 o'clock at night, and because we were over on the ground where we could see the fort going from Lead City up to work.

On cross-examination the witness testified as follows:

I have been closer to the fort than Gold Run in going to and from my work on the Gunn tunnel. I worked constantly from the 15th of February until the last of March on the Gunn tunnel, when we completed it. I did not have the jim-jams in the latter part of Feb., '77. If Jim Chaplin should testify so I should tell him he was a liar. I was not sick in the latter part of Feb.

896 J. H. WILSON was then called as a witness on the part of defendant and testified as follows:

I know where and when the second fort was built on Clara No. 2 Hill in the spring of '77. I think it was built between the 20th & 25th of March. I was working for Billy Gay at the time—cooking for him—and I was there when they outfitted and went up there. They outfitted at Gayville and went up to take the mine. There was no difficulty in the latter part of February that I know of.

897 W. L. SACKETT was then called as a witness for defendant and testified as follows:

There was no fort erected on Clara Hill in the latter part of February, '77. I do not think it was erected before the 15th of March. It was erected, I should think, about 200 or 250 feet in a southerly direction from the trail and the Clara No. 2 shaft, right on the ridge and conspicuous. If it had been there the last of February or the early part of March I think I should have seen it.

On cross-examination the witness further testified as follows:

It was built about 3 logs above the ground, as well as I can remember, and then rocks or dirt put up in front of it. The first time I saw it I did not know what it was. I was some 200 or 300 feet away from it. I don't think I saw any cabin in the immediate neighborhood.

898 WALTER STONE was then called as a witness on the part of defendant and testified as follows:

I know where the second fort was built on Clara hill in the spring of '77. It was built in an easterly direction from the Bobtail shaft—that is, right where the trail breaks off at right angles coming down the creek upon the divide. It was in plain view from the trail. I did not notice it either in February nor up until the 17th of March. The first time I noticed it was, I think, within one day of the time Johnnie Slaughter was killed. If the fort had been there up to the 17th of March I think I would have noticed it.

On cross-examination the witness further testified as follows:

Between January and the 17th of March I was over that trail twice—on the 25th of Feb. & on the 17th of March. We were looking for quartz for the Pinney mill. I did not see the fort at either of those times.

899 HAMILTON UTLEY was then recalled on the part of defendant and testified as follows:

In the forepart of March, '77, I was up at the Clara to see the ore in the mine. I saw no fort there at that time on the hill immediately to the southeast. If there had been I think I would have seen it.

900 JOHN GODDARD was then called as a witness for defendant and testified as follows:

I knew where the second fort was built by the Clara No. 2 people in the spring of '77. I first saw it in the last part of March, '77. I was over the ground along about the 20th of March, and did not see any there. If there had been any fort there I think I would have seen it.

901 PORTER WARNER was then called as a witness on the part of defendant and testified as follows:

I was living and publishing the Daily Times in Deadwood in April, '77. (Here witness was handed for identification a copy of the Black Hills Daily Times, dated April 7th, '77.) That paper was issued by me. There was a notice handed to me for publication similar to that at the foot of the first column by, I think, John R. Pearson.

Defendants here introduced in evidence the publication referred

to, purporting to be a notice of date April 2d, '77, announcing a settlement of difficulty between the Giant owners and the Clara No. 2 location, which reads as follows:

"*Notice.*

"GAYVILLE, *April* 2, 1877.

"We, the undersigners, owners and locators of the Giant lode, after careful examination, have become thoroughly convinced that the lode known as the Clara No. 2 in no way interferes or conflicts in any manner whatever with our interests on the Giant lode, and we do hereby relinquish all claim to the Clara No. 2 lode.

902 "JOHN B. PEARSON.
"J. ENGLSBY.
"—— FAY.
"W. GAY.
"A. GAY."

That was handed to me the 7th of April; might have been a day or two before.

903 JAMES A. KEY was then called as a witness on the part of defendant and testified as follows:

I recollect the time of the commotion between the Gay party and the Clara party. I do not recollect the exact date of the building of the second fort on Clara Hill, but the boys would be in my house every night talking and guessing at the date. I should say it was the latter part of March, '77. It was built somewhere about the time Johnnie Slaughter was killed.

904 F. J. AMES was then called as a witness on the part of defendant and testified as follows:

I had charge of the Gold Run toll-road from December, '76, until April or May, '77. There was but very little work done on that road in the months of February and March, '77. I paid off the men that worked on the road, and there was no work whatever done by Tom Mahan.

On cross-examination the witness further testified:

I kept the books of the road; kept them as regularly as I could. The men that worked on the road reported to me. C. F. Thompson was an owner in the road at that time, and I credited him with some work, and also Mr. Weber.

905 THOMAS F. MAHAN was then recalled on the part of defendant and testified as follows:

I was present on the Gold Run ground in the month of May, '77, along with Jack McMasters, John B. Pearson, McIntyre, Flaherty, and some others; Jack Dawson was there. They called him over to point out some trees or stakes to them. He pointed out a tree or stump, but I cannot tell how far it was from the south end of the

Bobtail, as I did not pay much attention to it. I know when the second fort on Clara Hill was built. There were seven or eight engaged in building it—Delaney, Gibbons, Mallory, Moore, Gunn, Lackey, McMasters, & myself. It was built in the neighborhood of 300 feet in an easterly direction, on the ridge of a hill from the Bobtail and Clara No. 2 shaft. It was in a conspicuous position. It was built of logs, with small dry logs on top covered with sand. It was built on the latter part of March, after the 15th some days, because Gay did not send his men to work until after that time; then they were put off, and we built the fort then to keep them off.
906 Frank Coyle & I stopped there one night. I know about the the time Johnnie Slaughter was killed; that was about the 26th of March, and the fort was built a few days before that. The settlement between the Giant and Gay party was published in the Deadwood Daily Times.

On cross-examination the witness further testified:

At the time of the McIntyre survey I went up with Sam McMasters and two or three others. I do not know whether Dawson was with us or not. I do not know what McIntyre said to Dawson nor Dawson to McIntyre. They went off on one side & I did not hear their conversation. I did not hear McIntyre say anything to Dawson except to call him to point out that Gold Run stake.

Re-ex::

Gibbons attended Canty's funeral. I have no recollection of his sleeping a night in my cabin after the 14th of February. I think he was a little superstitious on account of the death of Canty. After the funeral he went to Jack McMasters' cabin for a day
907 or two & then to Delaney's & McGowers.

And now, inasmuch as the matters aforesaid are not of record, and the foregoing bill of exceptions and case containing all the evidence offered by either party on the trial of this cause, and the defendants having filed their motion to correct the findings of fact, and the court having overruled said motion, and the defendants having duly excepted to said ruling of said court on said motion, and the defendants having thereupon filed their motion for a new trial, and the court having overruled said motion for a new trial, the said defendants having duly excepted to said ruling of said court on said motion for a new trial, and to the judgment thereon rendered, and the defendants having prayed the court here to sign, seal, and allow this their bill of exceptions and case, as appears in books 1, 2, 3, 4 & 5 of abstract of testimony, and order the same to be made a part of the record in this cause, the judge of said court now here settles and signs this bill of exceptions and case, and orders the same made matters of record, and the clerk of said court will file the same as a record in said cause.

Done in open court on the 3d day of December, A. D. 1881, the settlement of this bill of exceptions and case having been had within the proper time, as allowed by the court, upon the agreement

of the respective parties, duly filed, and by orders of the court, from time to time duly made and entered in the records of said court.

G. C. MOODY, *Judge.*

908 In the District Court [of] the First Judicial District.

CALEDONIA GOLD MINING COMPANY (Formerly Henry Lackey *et al.*),

vs.

JOHN NOONAN and THOMAS F. MAHAN.

TERRITORY OF DAKOTA, } *ss:*
County of Lawrence, }

I, the presiding judge of said district court, who presided at the trial of the above-entitled action, do hereby certify that the foregoing papers, to wit, the summons, complaint, answer, order substituting the Caledonia Gold Mining Company as plaintiff, the amended and substituted complaint, answer to amended and substituted complaint, the replication, the journal entry of July 15, 1880, amendment of complaint, findings of fact and conclusions of law, the remarks of the court accompanying the decision, motion to correct the findings of the court, the journal entry of November 29th, 1882, denying said motion, motion for a new trial, the order overruling motion for a new trial, the judgment and decree, bill of exceptions are contained in and constitute the whole of the judgment-roll in *in* the above-entitled action as the same remains of record in said district court.

Dated this 1st day of July, A. D. 1882.

G. C. MOODY, *Judge.*

909 In the District Court of the First Judicial District.

TERRITORY OF DAKOTA, } *ss:*
County of Lawrence, }

I, Frank J. Washabaugh, clerk of the district court within and for said county of Lawrence, in the first judicial district of the Territory of Dakota, do hereby certify that the above and foregoing is a full, true, correct, and complete transcript and copy of the notice of appeal and proof of service thereof, of the judgment roll, and of the certificate of the judge in the above-entitled action, wherein the Caledonia Gold Mining Company is plaintiff and John Noonan and Thomas F. Mahan are defendants, as the same now remains of record in said court.

In witness whereof I have hereunto set my hand and affixed the seal of said court this 1st day of July, A. D. 1882.

[SEAL.] FRANK J. WASHABAUGH, *Clerk.*

910 Be it remembered that at a term of the supreme court of the Territory of Dakota begun and held at the capitol, in Yankton, the seat of government of said Territory, on the first Tuesday of October, on the 4th day of the term, to wit, on the 6th day of October, A. D. 1882—present, A. J. Edgerton, chief justice, and G. C. Moody, J. P. Kidder, and S. A. Headson, associate justices of said court—the following proceedings were had, to wit:

Appeal from the District Court, First Judicial District.

THE CALEDONIA GOLD MINING CO., Formerly Henry Lackey *et al.*, Respondent,

vs.

JOHN NOONAN & THOS. F. MAHAN, Appellants.

And now, this 6th day of October, 1882, the above cause coming on for argument & hearing in its regular order on the calendar, comes D. McLaughlin, Esqr., of McLaughlin & Steele, with argument for John Noonan *et al.*, appellants.

And now, on the 7th day of October and on the 5th day of the term.

Appeal from the District Court of Lawrence County, 1st Judicial District.

THE CALEDONIA GOLD MINING COMPANY, Respondent,

vs.

JOHN NOONAN & THOMAS F. MAHAN, Appellants.

911 And now, this 7th day of October, 1882, and on the 5th day of the term, the above cause coming for further argument, D. McLaughlin continuing his argument for said appellants.

And now on the 9th day of October, 1882, and on the 6th day of the term.

Appeal from the District Court of Lawrence County, 1st Judicial District.

THE CALEDONIA GOLD MINING COMPANY, Respondent,

vs.

JOHN NOONAN & THOS. F. MAHAN, Appellants.

And now, this 9th day of Oct., 1882, the above-entitled cause coming on for further argument, D. McLaughlin, Esqr., appearing for appellants.

And now, on the 10th day of October, 1882, and on the 7th day of the term.

Appeal from the District Court of Lawrence County.

THE CALEDONIA GOLD MINING COMPANY, Respondent,

vs.

JOHN NOONAN and THOS. F. MAHAN, Appellants.

And now, this 10th day of October, 1882, the above-entitled action being further argued by Justrery C. Skinner, one of the attorneys for said respondent.

912 And now, on the 11th day of October, 1882, and on the 8th day of term.

THE CALEDONIA GOLD MINING COMPANY, Respondent,

vs.

JOHN NOONAN & THOS F. MAHAN, Appellants.

And now, this 11th day of October, A. D. 1882, Mr. Wm. H. Clagett proceeds with argument in behalf of the respondent in the above-entitled action.

And now, at 3 o'clock p. m., D. McLaughlin for the appellants.

And now, at 6 o'clock p. m., court adjourned to Thursday, Oct. 12, 1882, at 9 o'clock a. m. of said day.

And now, on the 12th day of October, 1882, and on the 9th day of term.

Appeal from the District Court of Lawrence County.

THE CALEDONIA GOLD MINING COMPANY, Respondent,

vs.

JOHN NOONAN & THOMAS F. MAHAN, Appellants.

And now, this 12th day of October, 1882, D. McLaughlin, Esqr., proceeds with his closing argument for said appellants, and thereupon cause [is] submitted to the court.

913 *Bill of Costs and Disbursements by Respondent.*

In the Supreme Court, Territory of Dakota. October Term, A. D. 1882.

THE CALEDONIA G. M. CO., Respondent,

vs.

JNO. NOONAN and THOS. F. MAHAN, Appellants.

To printing original brief, 55 pages and back, @ $1.50 per page	$85 50
To printing supplemental and additional brief, 21 pages, at $1.00 per page	$21
To printing abstract of evidence on behalf of respondent, 6 pages, at $1.00 per page	$6
	$112 50

TERRITORY OF DAKOTA, } *ss:*
Yankton County, }

T. L. Skinner, being duly sworn, says he is one of the counsel for respondents in the above-entitled cause; that he is informed and fully acquainted with the amount of costs expended in print-
914 ing in this cause by the respondent in this court, and that the above statement is a true and correct account of respondent's disbursements made in this action and incurred, and which, as affiant verily believes, respondent is entitled to have taxed as costs

in his behalf if the judgment of the court below be affirmed by this court.

T. L. SKINNER.

Subscribed and sworn to before me this 10th day of October, 1882.
[SEAL.] B. S. WILLIAMS, *Clerk.*

915 In the Supreme Court of Dakota Territory. October Term, 1882.

THE CALEDONIA G. M. Co., Respondent,

vs.

JNO. NOONAN and THOS. F. MAHAN, Appellants.

To Messrs. McLaughlin and Steel, att'ys for appellants.

GENTLEMEN: Please take notice that on the accompanying affidavit the undersigned will, in case the judgment in this cause be affirmed which was rendered in the court below, and upon the entry of the judgment of affirmance here, ask the clerk to tax in such judgment the sum of $112.50 as respondent's costs in this appeal.

Yankton, D. T., Oct. 10th, 1882.

WM. H. CLAGETT AND
T. L. SKINNER,
Att'ys for Respondent.

916 [Endorsed:] In supreme court. Caledonia G. M. Co., respondent, *v.* Jno. Noonan and Thos. F. Mahan, appellants. Notice & motion to tax costs. Service admitted without prejudice Oct. 10th, 1882, *without prejudice.* McLaughlin & Steele, att'ys for def'ts. Wm. H. Clagett and T. L. Skinner, att'ys for respondent. Filed Oct. 11th, 1882. B. S. Williams, clerk.

917 *Appeal from the District Court of Lawrence County.*

In the Supreme Court. October Term, 1882.

THE CALEDONIA GOLD MINING COMPANY, Plaintiff,

vs.

JOHN NOONAN & THOMAS F. MAHAN, Defendant-.

THE UNITED STATES OF AMERICA, } ss:
Territory of Dakota, }

This action coming on to be heard at the October, A. D. 1882, term of said supreme court, at the supreme court room, in the city of Yankton, D. T.—present, A. J. Edgerton, chief justice, and G. C. Moody, J. P. Kidder, and S. A. Hudson, associate justices—and the appeal herein having been argued by Daniel McLaughlin, Esqr., for the appellant, and by W. H. Clagett & T. L. Skinner, Esqrs., for the respondent, and the court having advised thereon, it is now here considered, ordered, and adjudged that the judgment of the said district court within and for said Lawrence county, appealed from

herein, be, and the same is hereby, in all things affirmed; and it is further ordered that this cause be, and it is hereby, remanded to the district court for further proceedings according to law and the judgment of this court.

And it is further considered and adjudged that the plaintiff and respondent have and recover of the defendants & appellants its *his* costs and disbursements on this appeal expended, taxed and allowed at —.

By the court, all the justices concurring:

A. J. EDGERTON,
Chief Justice Supreme Court, D. T.

918 [Endorsed:] In supreme court, Territory of Dakota. October term, 1882. The Caledonia Gold Mining Company, plaintiff, *vs.* John Noonan & Thomas F. Mahan, defendant. Filed this 14th day of October, 1882. B. S. Williams, clerk.

919 In the Supreme Court, Territory of Dakota.

CALEDONIA GOLD MINING COMPANY, Plaintiff & Respondent,

vs.

JOHN NOONAN & THOMAS F. MAHAN, Defendants & Appellants.

Now, on this 14th day of October, A. D. 1882, it being the October term thereof, this cause having been heard and determined by this court, it is—

Ordered, That the findings of fact of the said first judicial district court, from whence this cause came, be, and the same are hereby, adopted by and made and constituted as the findings of this court in said cause, to the end that the said defendants may have the benefit thereof if they shall perfect their appeal to the United States Supreme Court.

By the court: A. J. EDGERTON,
Chief Justice.

920 CALEDONIA GOLD MINING COMPANY

vs.

JOHN NOONAN & THOMAS F. MAHAN.

Upon motion of counsel for the defendants & appellants and by consent of the plaintiff's counsel—

Ordered, The remittitur in this case by stayed for ninety days from this date, to enable defendants to perfect their appeal to the Supreme Court of the United States if they shall be so advised.

October 14th, 1882.

By the court: A. J. EDGERTON,
Chief Justice.

921 *Appeal from Lawrence County.*

In Supreme Court, October Term, 1882.

CALEDONIA GOLD MINING COMPANY, Plaintiff & Respondent,

vs.

JOHN NOONAN and THOMAS F. MAHAN, Defendants and Appellants.

UNITED STATES OF AMERICA, *Territory of Dakota:*

McLaughlin and Steele, Esqs., for appellants; W. H. Claggett and T. L. Skinner, Esqs., for respondent.

Opinion of the Court.

MOODY, *J.:*

This action was brought to determine conflicting claims to mining ground situated in Whitewood quartz mining district, Lawrence county. The plaintiff claims by virtue of the Caledonia location, and the defendant by a location called the Bobtail. The defendant Noonan, claiming to be the owner of the Bobtail, applied for a patent, and pending that application, after making
922 the requisite protest to stay the issuance of patent, the plaintiff brings this action.

The trial was to the court without a jury. Judgment was rendered for the plaintiff and the defendants appeal.

Ninety-eight assignments of error appear in defendants' brief, being the same as those stated in the motion for a new trial, all of which that it is important should be now noticed can be classified and disposed of in four general propositions.

The first relates to the manner of making an amendment to the complaint and making the defendant Mahan a party thereto during the trial.

The second to the admission of certain secondary evidence and depositions.

The third to the admission of evidence of acts of location performed and declarations made regarding the disputed claims prior to the 28th day of February, 1877, and while they were still covered by the Great Sioux Indian reservation.

And fourth to the alleged insufficienty of the evidence to sustain the findings and decision of the district court.

Notwithstanding the defendant Noonan, when he applied for the patent, claimed to be the sole owner of the Bobtail and to take the title to himself, and that the action was brought upon that
923 theory, it became apparent during the progress of the trial that his grantor, Thomas F. Mahan, who claimed still to have an interest in the claim, was a proper, if not a necessary, party to a complete determination and settlement of the question involved in the controversy. And thereupon, by consent of all the parties, the court made an order making Mahan a party defendant, and the following minute was entered in the journal after the title: "Now, on this 15th day of July, A. D. 1880, the trial of this cause resumed

By consent of all parties, Thomas F. Mahan is made a party defendant in this action. Counsel for defendant appears and answer- instanter for him any amendments to pleadings required during the pendency of this action or at its conclusion."

The authority to cause such an amendment to be made cannot be doubted. Section 142, Code of Civil Procedure, among other things provides: "The court may, before or after judgment, in furtherance of justice and on such terms as may be proper, amend any pleading, process, or proceeding by adding or striking out the name of any party," &c.

Mahan was in court as a witness and was assisting in the
924 conduct of the defense, and upon such consent order being made the attorneys for the other defendant of record at once appeared for him, the understanding being had that thereafter and before judgment the pleadings should be arranged accordingly.

Thereupon the trial proceeded wit- the two partie- defendants, they joining in all the subsequent proceedings, including the motion to correct the findings, motion for a new trial, objections, exceptions, etc., and they join in this appeal. Before judgment and when the plaintiff's counsel came to perfect the record as to Mahan, instead of rewriting the complaint and inserting the name of Mahan where it would properly come, as is the regular and much the better practice, they made and served upon defendants' counsel and filed with the judgment roll an amendment to the complaint in these words after the title: "Now comes the above-named plaintiff, and in pursuance and by authority of the court hereinbefore made on the 15th day of July, 1880, making the said Thomas F. Mahan a defendant in this action, amends its amended and substituted complaint which was herein filed November 6, 1879, by inserting therein the name of the said Thomas F. Mahan as a defendant, and by insert-
925 ing in and adding to said complaint, immediately after the subdivision thereof numbered 9, and before the prayer thereof, the following allegations, to wit:

"10. And plaintiff further avers that the defendant, Thomas F. Mahan, has, or claims to have, some right, title, or interest adverse to plaintiff in or to that portion of the said Caledonia lode claim above described by survey; that said claim of said defendant Mahan is with foundation or right as against the plaintiff, but said Mahan persists in the same and makes said claim, as plaintiff is informed and believes, under the said alleged or pretended location of the said alleged Bobtail lode claims above described as co-owner with or claiming under the same right as defendant Noonan, as above mentioned, and that said claim of said Mahan casts a cloud upon plaintiff's title to said portion of said Caledonia lode above described, and plaintiff therefore makes said Mahan a defendant in this action and asks the same judgment, decree, and relief against him as is hereinafter prayed against said defendant Noonan.

"CLAGETT & DIXON,
"*Attorneys for Plaintiff.*"

926 No objection was made in the district court to this mode

of amending a pleading, nor was the attention of that court in any way called to it. Upon this appeal the objection for the first time is made. It is alleged to be an irregularity and also that this amendment to the complaint is an amended complaint and takes the place of the original, the argument being, as it is (as assumed) an amended complaint, and as it does not in and of itself state a cause of action, the judgment cannot be sustained.

It is quite true that an amended pleading takes the place of the pleading amended, and that the original drops out of and ceases to be a part of the record, and it is also true that the mode of making amendments of pleadings recognized by our practice is by rewriting the pleading, leaving out such other allegations as may be desired, so that all the parts of the pleading shall be in one instrument or paper and be complete in itself.

But this subsequent writing does not purport to be an amended complaint—only an amendment to the complaint. At the worst it is but an irregularity, which cannot be taken advantage of for the first time upon appeal.

927 No doubt if the attention of the district court had been called to it the regular and proper practice would have been enforced and the plaintiff compelled to rewrite the complaint, inserting the name of Thomas F. Mahan in its proper place. Even in this court, if it was necessary, it would be within the power of the court to cause so technical an objection to be obviated by having both writings incorporated together, as it would involve nothing greater than the performance of some clerical labor by the plaintiff's counsel or other person, and would not in any way affect or change the rights of the parties; but it is not necessary. The complaint, the order, the minute entered upon the journal, the amendment, and the subsequent proceedings make the record complete as to Mahan, as well as Noonan, and they cannot be heard now to complain of the form of proceedings which do not affect their substantial rights.

We are constrained to this view by the express com-and of the statute. Section 145 Code of Civil Procedure is as follows:

928 "The court shall in every stage of the action disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect."

But it is said Mahan has not answered the complaint, and upon the argument it seemed to be cherished as a merit that his counsel had advised him not to answer. It is only his fault if he has not, and he may be now liable to the consequences of a default, but with the agreement on the trial the plaintiff seems to have complied, as the action has been tried and determined and all proceedings taken as though he had answered in full. Certainly the adverse party is no way subject to censure for his not answering. He had the fullest opportunity to do so and has stipulated to answer at once. More than likely the answer of his co-owner and codefendant was deemed sufficient, as it not only puts in issue the plaintiff's title,

but sets up the title in both Noonan and Mahan—all that Mahan could possibly plead for himself under the proofs. In any event it is not in courts of justice regarded as meritorious for a party
929 to seek advantage by reason of his own laches. We might have dismissed this point with much less consideration, as no mention is made of it either in the motion for a new trial or anywhere in the bill of exceptions.

Upon the trial the plaintiff, to prove its corporate existence, offered in evidence, in addition to the proofs of use, a copy of its articles of incorporation certified by the county clerk of the city and county of San Francisco, the place of its principal business, under his seal of office, to which was appended a certificate of the secretary of state of the State of California, under the great seal of the State, both certificates reciting that it is a copy of the original now on file in their respective offices, and also a similar copy certified to by the secretary of the Territory as [a] copy of the articles on file in his office, with the great seal of the Territory attached. In connection with these the laws of the State of California relating to the organization of incorporation- were produced and offered in evidence without objection, by which laws it appears that such articles are re-
930 quired to be filed, one in the clerk'- office of the county in which the principal place of business is situated, and a copy thereof with the secretary of state. Both of these for the purpose of incorporation may be considered as originals.

To the introduction of these certified copies a general objection was interposed that they were incompetent, irrelevant, and immaterial. Upon this appeal it is for the first time objected that they are not properly certified and authenticated as required by the acts of Congress and that the certificates are signed by the officers named by deputy.

Without stopping now to determine whether these objections would have been good if made in the court below, but conceding they would have been well taken, the question arises whether such objection taken for the first time upon appeal can be made available.

No rule of practice is better settled than that w-ere an objection to evidence could have been obviated upon the trial if specifically pointed out, an exception which does not specifically point out such objection will be unavailing upon appeal.

Says Mr. Waite in his work on practice, a text which is sup-
931 ported by all the cases to which our attention has been called and denied by none:

"Where a specific objection might have availed, a general objection will not be sufficient to raise the point on appeal, especially if the difficulty might have been obviated if such specific objection had been made."

"Where an exception to evidence is so general in its character as not to indicate the particular ground on which it was made, the exception will be unavailing unless the character of the objection was such that it could not have been obviated on the trial had it been specifically pointed out."

"It is well established that the courts do not favor any unfair or

secret mode of raising an objection, and therefore any objection which might have been fairly answered if seasonably made will be disregarded on appeal unless specifically taken below."

Waite's Prac., V. 3, p. 206; V. 4, p. 230.
Torley & Bacon, 70 N. Y., 37.
Levin & Russel, 42 *Id.*, 251.
Williams & Sergeant, 4 *Id.*, 481.
Bell & Meagher, 14 Otto, 288.
Braly & Reese, 51 Cal., 447.
Waterville M. Co., V. B, 9; Hon. Pr., 27.
Knapps *v.* Schneider, 24 Vis, 70.
City of Ripon *v.* Bettel, 30 *Id.*, 614.
Columbia, Del., Bridge Co. *v.* Geisse, 38 N. J. Law, 39.
Burton & Driggs, 20 Wal., 125.
932 Merrih *v.* Seamon, 6 N. Y., 168.
Coon *v.* S. & N. R. R., 5 *Id.*, 492–531.

If the specific objection had been made it would have been easy for the plaintiff to have supplied the certificate required by act of Congress or to have made other legal proof. The act of Congress providing for this kind of evidence is cumulative and not intended to supersede the common-law rules of evidence.

The evidence was secondary in its character. It was material, relevant, and competent to prove a compliance with the law of incorporation of California, and only objectionable because the additional certificate was not appended or other proofs made. Nothing is better understood than the rule which requires the objection to secondary evidence to be made specifically upon the ground that it is not the best evidence, or the objection to the introduction of an written instrument in evidence upon the ground that its execution has not been proven to be made upon that specific ground, to be of avail in a bill of exceptions. These rules are only fair and just to the trial court and to the adverse party.

933 If the objection goes to the merits and cannot be obviated, then a general objection may suffice, because in such case the evidence cannot be made available to the party by any subsequent acts.

To hold that a party may upon a trial interpose a general objection in no way pointing out the defect of which he complains, and which could be easily and speedily remedied, and then for the first time in the appellate court raise the merely technical objection that the paper offered was not sufficiently certified or authenticated or otherwise proven, would be opening the door to the grossest unfairness and would be trifling with the administration of the law.

If parties desire to avail themselves of such objections they must make them in the trial court with such particularity and so specifically that this court can see that such trial court has passed upon the very question presented here. Not one case has been called to our attention where a contrary doctrine is sustained.

934 We have treated this question altogether independent of the proofs which were given of the acts of this plaintiff as a

corporation in good faith, and the expenditure of many thousand dollars in the conduct of its business in this Territory, together with other facts. These facts were sufficient to establish its *de facto* existance, no proofs being offered to the contrary.

The same views we have expressed with reference to the articles of incorporation will apply with equal or more force to the questions made with regard to the reading of the depositions of Keithly and Chizzum.

The objections and exceptions are of the same character as those before given, and now it is urged that it does not appear in the evidence that Keithly was proven to have been out of the country, nor does it appear that appended to the Chizum deposition is a notice of the taking.

In addition to the difficulties in the way of considering this exception already suggested in the absence of its appearing affirmatively that no such proof was made to the trial court & that the reading of the deposition was objected to on that specific
935 ground, this court must presume sufficient grounds were laid and sufficient proofs was made to authorize the reading of the depositions.

We cannot, without extending this opinion to a great and useless length, notice the several instances in which similar technical objections are now sought to be made for the first time in this court to the admissability of evidence against which no objection or no specific objection was made in the district court. Suffice it to repeat what we have before in substance said in this case and held in other cases: Parties must point out to the district court the precise question upon which they seek a ruling, and must be able to put their fingers upon and show to this court the very error of which they complain in such ruling. It will not answer to put into the bill a general objection in nowise calculated to inform the trial court or the adverse party what is the ground of the objection and then attempt here to spring a trap and thus unfairly obtain a new trial
936 of the action. Numerous objections were made to evidence introduced by the plaintiff of acts relating to the location of these mining claims and to declarations of the defendants and their grantors prior to the 28th day of February, 1877, the date on which by the cession of the Black Hills by the Sioux Indians the lands in controversy became open to exploration and purchase.

This court has before held that no rights could be acquired to any lands in the Black Hills prior to the 28th of February, 1877, by reason of the existence until that time of the Sioux Indian reservation covering that part of the Territory.

Uzley *v.* Garrison.

French *v.* Lancaster.

And therefore, if the plaintiff'- rights rested upon acts of location done prior to such date, these objections would present the question squarely, and, following the former decisions, we would be necessarily compelled to hold the objections well taken.

The right of possession to a quartz mining claim depends,
937 after a discovery of the vein within the limits of the claim,

upon the performance of certain acts of location and a continuing compliance with the laws of Congress, and with the local laws, rules, and regulation not inconsistent with such laws of Congress.

Such acts performed while the inhibition of the treaty with the Indians remained in force were of no avail, but a party in possession on the 28th day of February, 1877, with the requisite discovery, with the surface boundaries sufficiently marked with the notice of location posted, and with a disclosed vein of ore, could, by manifesting his adoption of these facts and subsequently causing a proper record to be made and performing the amount of labor or making the improvements necessary to hold the claim, date his rights from that day, and such location and subsequent labor & improvements would give him the right of possession from that day thereafter.

This case was tried before the decision in French *v.* Lancaster, and before it was known what views this court would entertain as to the validity of a mining location made while the reservation still covered these lands, and by consent both parties to the con-
938 troversy adduced evidence of acts and declarations occurring prior to February 28, 1877, as well as of facts existing on that day and occurring thereafter, each reserving the right to raise the question of the competency of such evidence by exception to be incorporated in the bill if they desired.

The cause was tried *to* the court, and the findings distinctly, clearly, and fully discriminate between acts done before and those done after said date and those facts which on that day existed, so that by eliminating and striking from the transcript all the evidence and all the findings having reference to matters occurring prior to such date the findings abundantly support the judgment in plaintiff's favor and the evidence clearly and fully support and authorize the findings.

The defendants are therefore in nowise prejudiced by such evidence or such findings as are objected or excepted to for the reason stated.

In a trial *to* the court findings being made evidence wholly immaterial, which does not enter into and could have no influence upon the findings, which are the basis of the judgment, and upon which it rests, does not prejudice the defeated party, and the
939 admission of such evidence is not error for which a judgment will be reversed.

Immaterial findings which are not the basis of the judgment or other sufficient findings appearing in the record will not vitiate the judgment or cause its reversal.

This question in this case is the precise question which was involved in Golden Terra Mining Co. *v.* Smith, administrator, &c., decided in this court.

In that case the court held that findings of acts of location of a mining claim done prior to the 28th of February, 1877, and the admission of evidence of such acts did not prejudice the plaintiff and was not a ground for reversal, the findings in that case, as in this, making a clear distinction between facts occurring before and after that date.

In the case of French *v.* Lancaster, which is cited by defendants as sustaining their view, the trial was to a jury, and a general verdict was rendered. Therefore it was impossible in that case to make the distinction made in this and the Golden Terra case, as it was not possible to determine what portion of the evidence entered into and aided in making up such general verdict. These cases are readily distinguishable.

940 Again, in the case at bar both parties in their pleadings claim by reason of location made before and relocations made after February 28th, and the evidence was directed to such separate and distinct issues, so there could be no confusion and no room for prejudicing the defendants' rights by receiving such evidence.

We follow the decision in the case of Golden Terra Mining Co. *v.* Smith in this, and hold no error prejudical to the defendants resulted from the introduction of the evidence in question.

The remaining questions are properly grasped under the allegation of the defendants that the findings are not supported by the evidence.

The rule which this court has several times announced as binding it precludes us from trying the cause anew. Under the practice act of the Territory now in force this court in this case is empowered to correct the errors occurring in the district court, but cannot try the case anew. The evidence was taken orally and comes here by bill of exceptions. We can only examine it for the purpose of considering the exceptions, and among them the exceptions to the decision upon the ground of the insufficiency of the evidence to sustain it.

941 Therefore we are only to look into it. The evidence upon these exceptions now being considered to ascertain whether there is a substantial conflict in the evidence, and whether the material findings are supported by sufficient and substantial evidence, if the findings are thus supported we cannot say the district court has, in making them, erred. We cannot weigh the evidence and determine its preponderance between the parties. That is the province of the district court. There the demeanor of the witnesses, the manner of testifying, and many almost intangible circumstances can be observed and appear which aid the trier to determine the credibility of the witnesses and the weight to be given their testimony. Here we have no such opportunity.

This cause took some four weeks to try. The abstract contains nearly four hundred printed pages of testimony abbreviated. Sufficient of it has been read upon the argument in this court during the five days devoted to it to make it entirely clear that there was great conflict of evidence and that the material findings are all fully sustained by the evidence, and therefore the exceptions to the decision for insufficiency of the evidence to sustain it are not well founded.

942 No other questions of sufficient importance to require attention in this opinion are made.

The judgment of the district court is affirmed, all of the justices concurring.

943 [Endorsed:] In supreme court. The Caledonia Gold Mining Company *v.* John Noonan & Thomas F. Mahan. Opinion of the court. Moody, J'e. Published & filed this 28th day of October, A. D. 1882. B. S. Williams, clerk.

944 *Notice of Appeal.*

In the Supreme Court of the Territory of Dakota, *ss:*

THE CALEDONIA GOLD MINING COMPANY (Formerly Henry Lackey, Louis P. Elliott, John M. Murphy, James Lynch, Michael Heffron, James Manning, John Morrow, Peter O'Neill, and Robert Curlin), Respondent,

vs.

JOHN NOONAN and THOMAS F. MAHAN Appellants.

The above-named John Noonan and Thomas F. Mahan, appellants, conceiving themselves aggrieved by the final judgment and decree entered on the 14th day of October, A. D. 1882, in the above-entitled cause, do hereby appeal therefrom to the Supreme Court of the United States, and they pray that their appeal may be allowed, and that a transcript of the record, proceedings, bill of exceptions, etc., in the said cause, duly authenticated, may be sent to the Supreme Court of the United States.

McLAUGHLIN & STEELE,
Attorneys for Appellants.

945 The appeal in the foregoing case is allowed, and the clerk of the said supreme court of the Territory of Dakota will transmit the record and proceedings in said cause, as prayed, to the Supreme Court of the United States,

Yankton, Dakota, December 12th, A. D. 1882.

A. J. EDGERTON,
Chief Justice of the Supreme Court of the Territory of Dakota.

946 [Endorsed:] In supreme court. Caledonia Gold Mining Company, respondents, *vs.* John Noonan *et al.*, appellants. Notice of appeal. Filed December 12, 1882. B. S. Williams, clerk.

947 *Bond on Appeal.*

Supreme Court of the United States.

THE CALEDONIA GOLD MINING COMPANY (Formerly Henry Lackey, &c.), Respondent,

vs.

JOHN NOONAN and THOMAS F. MAHAN, Appellant-.

Know all men by these presents that we, John Noonan, Thomas F. Mahan, Ben Baer, and William M. Baird, of the county of Lawrence and Territory of Dakota, are held and firmly bound unto the Caledonia Gold Mining Company, owning property and doing business in the county of Lawrence and Territory of Dakota, in the sum of five thousand dollars, to be paid to the said Caledonia Gold Min-

ing Company, its successors or assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and *one* and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 27th day of November, A. D. 1882.

948 Whereas the above-named John Noonan and Thomas F. Mahan have appealed to the Supreme Court of the United States to reverse the judgment and decree rendered in the above-entitled action by the supreme court of the Territory of Dakota on the 14th day of October, A. D. 1882:

Now, therefore, the condition of this obligation is such that if the above-named John Noonan and Thomas F. Mahan shall prosecute their said appeal to effect, and *to* answers all costs and damages, including just damages for delay and costs and interest on the appeal, if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

JOHN NOONAN. [SEAL.]
THOMAS F. MAHAN. [SEAL.]
BEN BAER. [SEAL.]
W. M. BAIRD. [SEAL.]

Filed and delivered in the presence of—
WILLIAM R. STEELE.
JAMES S. MULLALY.

TERRITORY OF DAKOTA, } *ss:*
County of Lawrence, }

Be it remembered that on this 28th day of November, A. D. 1882, personally appeared before the undersigned, clerk of court, John Noonan, Thomas F. Mahan, Ben Baer, & Wm M. Baird, personally well known to me to be the persons described in & who executed the foregoing instrument of writing, and duly acknowledged to me that they executed the same for the uses and purposes therein expressed.

In testimony whereof I have hereunto set my hand & attached the seal of said court the day and year last above written.

FRANK J. WASHABAUGH,
Clerk of Court.

949 UNITED STATES OF AMERICA,
Territory of Dakota, County of Lawrence:

Ben Baer and Wm. M. Baird, being duly sworn, depose and say, and each for himself saith, that he is worth the sum of five thousand dollars over and above his just debts and liabilities, exclusive of property exempt from execution, and is a resident and householder in said county of Lawrence.

BEN BAER.
WM. M. BAIRD.

Sworn to before me this 28th day of November, A. D. 1882.
FRANK J. WASHABAUGH,
Clerk Dis. Court in & for Lawrence County, D. T.

I approve the above bond and the sufficiency of the sureties thereto this 12th day of December, A. D. 1882.

A. J. EDGERTON,
Chief Justice of the Supreme Court of the Territory of Dakota.

950 [Endorsed:] In supreme court. The Caledonia Gold Mining Company, respondent, *vs.* John Noonan *et al.*, appellants. Bond on appeal. Filed this 12 day of December, 1882. B. S. Williams, clerk.

951 In the Supreme Court of the Territory of Dakota.

THE CALEDONIA GOLD MINING COMPANY (Formerly Henry Lackey *et al.*,) Respondent,

vs.

JOHN NOONAN and THOMAS F. MAHAN, Appellants.

I hereby certify that I am well acquainted with Ben Baer and William M. Baird, sureties on the bond of appeal to the Supreme Court of the United States in the above-entitled case; that each of them is a freeholder and resident of this county and Territory, and I consider each of them worth the amount for which he has qualified in said bond over and above all his debts, liabilities, and exemptions allowed by law, and that they are amply good and sufficient sureties on said bond on appeal.

Witness my hand and the seal of the district court this 2d day of December, A. D. 1882.

[SEAL.] FRANK J. WASHABAUGH,
Clerk First Dist. Court, D. T.

952 [Endorsed:] In supreme court. The Caledonia Gold Mining Company, respondent, *vs.* John Noonan *et al.*, appellants. Certificate of clerk of district court. Filed December 12, 1882. B. S. Williams, clerk.

953 UNITED STATES OF AMERICA, *ss:*

To the Caledonia Gold Mining Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, A. D. 1883, pursuant to an appeal filed in the clerk's office of the supreme court of the Territory of Dakota, wherein John Noonan and Thomas F. Mahan are appellants and you are respondent and appellee, to show cause, if any there be, why the judgment and decree in the said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 12th day of December, in the year of our Lord one thousand eight hundred and eighty-two.

A. J. EDGERTON,
Chief Justice of the Supreme Court of the Territory of Dakota.

954 [Endorsed:] In supreme court. Caledonia Gold Mining Company *vs.* John Noonan *et al.* Citation. Filed Dec. 30th, 1882. B. S. Williams, clerk. Service of a true copy of the within acknowledged, Dec. 23, 1882. T. L. Skinner, att'y for respondent.

955 *Affidavit of Value of Matter in Dispute.*

In the Supreme Court of the Territory of Dakota.

THE CALEDONIA GOLD MINING COMPANY (Formerly Henry La-key [*et*] *al.*), Respondent,

vs.

JOHN NOONAN and THOMAS F. MAHAN, Appellants.

TERRITORY OF DAKOTA, } *ss:*
County of Lawrence, }

Thomas F. Mahan, being first duly sworn, makes oath and says that he is one of the appellants in the above-entitled action, over the age of twenty-one years, and is well acquainted with the matter in dispute in said action and the value of the same; that the matter in dispute in said action is the title and right of possession of that certain mining claim and mineral land claim — by appellants as the "Bobtail lode" and by respondent as the "Caledonia lode," the area of the said mineral land in conflict being three & $\frac{57}{100}$ acres; that the value of said land so in conflict is, exclusive of the costs of this action, over the sum of one thousand dollars, being of the value of many thousand- of dollars, and that in addition to the
956 value of said property appellant Noonan claimed a damage of one hundred thousand dollars from the respondent by reason of its mining and removal of ore from the said ground in conflict, which claim- for damages have been determined against said appellant by the judgment and decree rendered in this action.

THOMAS F. MAHAN.

Sworn to before me and subscribed in my presence this 28th day of November, A. D. 1882.

[SEAL.] THOMAS M. MULLALY,
Notary Public, Lawrence County, Dakota Territ'y.

957 [Endorsed:] In supreme court. Caledonia Gold Mining Company, respondent, *vs.* John Noonan *et al.*, appellants. Affidavit of value of property. Filed this 12 day of December, 1882. B. S. Williams, clerk.

958 In Supreme Court, Territory of Dakota, *ss:*

I, B. S. Williams, clerk of the supreme court within and for the Territory of Dakota, do hereby certify that the foregoing pages of manuscript and printed matter contained in the judgment roll and in books numbered 1, 2, 3, 4, & 5 contain in themselves a full, true, & correct copy of the original transcript on appeal from the district court in and for the first judicial district to this court upon which said cause was determined in this court, wherein the Caledonia Gold

Mining Company is plaintiff & respondent, and John Noonan and Thomas F. Mahan are defendants & appellants; and book number 6 contains a full, true, and correct copy of the proceedings in this court, to wit: The judgment entered in this court of the opinions filed in the said cause, and of the undertaking on appeal to the Supreme Court of the United States, and the original citations issued out of this court with service duly attached thereto, as the same now remains of record in said cause in this court.

In witness whereof I have hereunto set my hand and affixed the seal of said court this 21st day of September, A. D. 1883.

[Seal Supreme Court of Dakota Territory.]

B. S. WILLIAMS, *Clerk.*

[Endorsed:] No. 121. Territory of Dakota supreme court. Caledonia Gold Mining Company *vs.* John Noonan and Thomas F. Mahan. Proceedings in supreme court.

Endorsed on cover: Dakota Territory supreme court. No. 170. John Noonan and Thomas F. Mahan, appellants, *vs.* The Caledonia Gold Mining Company. Filed 15th October, 1883.

121-393

In the Supreme Court

OF THE

United States.

OCTOBER TERM, 1886.

No. 170.

JOHN NOONAN AND THOMAS F. MAHAN,
Appellants,
vs.
THE CALEDONIA GOLD MINING COMPANY.
Respondent.

APPEAL FROM THE SUPREME COURT OF DAKOTA TERRITORY.

Brief and Argument of Appellants.

DANIEL MCLAUGHLIN and
WILLIAM R. STEELE,
Attorneys for Appellants.

1886.
HERALD PRINT,
DEADWOOD.

IN THE

Supreme Court

—OF THE—

UNITED STATES.

OCTOBER TERM, 1886.

No. 170.

JOHN NOONAN AND THOMAS F. MAHAN,
Appellants,

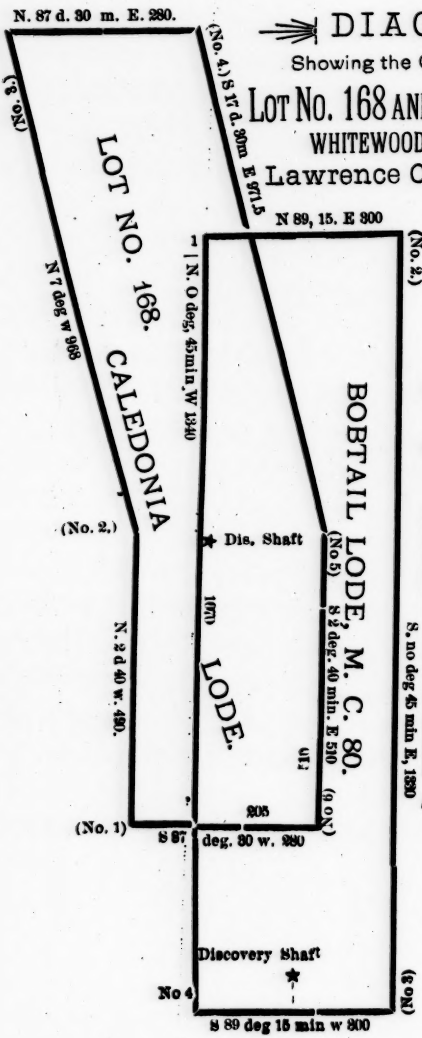
vs.

THE CALEDONIA GOLD MINING COMPANY.
Respondent.

STATEMENT OF THE CASE.

This action was originally begun on the 14th of June, 1878, by Henry Lackey, Louis P. Elliott, John M. Murphy, Michael Heffron, James Manning, John Morrow, Peter O'Neill and Robert Curlin, as plaintiffs, in the District Court of the First Judicial District of Dakota Territory, for Lawrence County, against John Noonan, defendant.

The defendant claimed to be the owner of, and had applied for a patent to the Bobtail lode claim, situated in Lawrence County, Dakota. The plaintiffs adversed his application in the U. S. Land Office, claiming to be the owners of the Caledonia lode claim, which conflicted with the Bobtail to the extent of three and forty-seven hundreths (3.57-100) acres, and they brought this action to determine their right to the possession of the ground in conflict. The following diagram will illustrate the position of the two claims, and the ground in dispute.



DIAGRAM

Showing the Conflict Between

LOT NO. 168 AND THE BOBTAIL LODE

WHITEWOOD MINING DISTRICT,

Lawrence County, Dakota.

DESCRIPTION OF GROUND IN CONFLICT.

Commencing at Cor. No. 6 of Lot No. 168, and Running as Follows:

No. Courses.	Courses.	Dists. Feet
1	S 87 d 30 m w...	205
2	N 0 d 45 m w...	1070
3	N 89 d 15 m e...	17
4	S 17 d 30 m e...	576,5
5	S 2 d 40 m e.....	510

Area of Ground in Conflict, 3.57 Acres.

Subsequently, the Caledonia Gold Mining Company became the purchaser of the Caledonia claim as located in June, 1876, from one Thomas Bell, who had previously purchased it from the plaintiffs, during the pendency of the action, as it had been located in 1876. It was substituted as plaintiff in this action by order of the court, without prejudice to the rights of the defendants.

The plaintiff's story is set forth in its "amended and substituted complaint," (*Printed Record, pages 10, 11, 12, 13 and 14*), and briefly told, is as follows: It is, and has been since September, 1878, a corporation organized under the laws of California, has complied with the provisions and requirements of the laws of Dakota Territory relating to "foreign corporations," and, therefore, authorized to do business, acquire, hold and dispose of property in this territory, and was then doing business in Lawrence County. Its grantors (the former plaintiffs,) had been the owners of the Caledonia lode since June, 1876, had sold and conveyed the same to Thomas Bell in August, 1878, who in turn, sold and conveyed it to the plaintiff in December of the same year. The inception of the Caledonia title is averred to have taken place by the discovery of the lode, and its location by Michael Lynch, Michael Heffron, Robert Curlin and James Manning, in 1876. The usual acts of a locator, such as making a discovery of the vein, staking the same, posting and recording the location notice, and so forth, it says, were all done in June, 1876. Work to the value of several hundred dollars was performed; and, on or about the 15th day of March, 1877, these four men, together with Henry Lackey, Peter O'Neill, Louis P. Elliott and John M. Murphy, "made an ADDITIONAL and SUPPLEMENTARY claim and location of said Caledonia claim;" and they had the notice of the same recorded in the Whitewood quartz mining district and County Register's offices. The defendant, it says, claims some interest in a portion of the ground covered by the Caledonia claim to the extent of three and

fifty-seven hundreths (3.57-100) acres, by virtue of a certain alleged location of a quartz mining claim called the Bobtail lode, which he (Noonan) claims was made in February, 1876, by his predecessors in interest, and which it alleges was and is invalid, and a cloud upon the title of the plaintiff to the Caledonia. It asks that the defendant may answer, and set out particularly his claim to that portion of the Caledonia lode in conflict with the Bobtail and the nature of his claim thereto, and prays for an injunction, judgment and decree in its favor.

The defendant's answer to this complaint, is:

1. A general denial of every allegation therein, except such as were thereinafter (in the answer) admitted.

2. A denial of any knowledge or information sufficient to form a belief whether or not the plaintiff was a corporation, under the laws of California, or, whether or not it had complied with the provisions and requirements of the laws of Dakota in regard to foreign corporations.

3. An admission that at the commencement of this action the defendant claimed to be the owner of the Bobtail lode on the easterly side of Shumache Gulch, in Whitewood quartz mining district in said Lawrence County, and had made an application for a U. S. patent for the same; and that Henry Lackey and others (the former plaintiffs herein,) filed their protest and adverse against said application in the United States Land office at Deadwood in said Lawrence County, and commenced this action to determine the right to the possession of the ground in conflict between the alleged Caledonia and Bobtail locations amounting to three and fifty-seven hundredths acres.

4. A statement of new matter constituting a defense and counter claim to wit: That on or about the 24th day of February A. D. 1876, one H. S. Ireton, one D. G.

Chizum and one Thomas E. Carey, citizens of the United States, discovered upon the mineral land of the United States, a vein or lode of valuable gold bearing ore near the head of Shumache Gulch on the easterly side thereof, in said county and located thereon the Bobtail quartz lode, 1500 feet in length northwardly from the discovery, by a width of one hundred and fifty feet on each side of the centre of the vein ; that they sank a discovery shaft, and did the other acts of location, such as marking the boundaries of the claim, posting a notice of location at the point of discovery, and having the same recorded with the District Mining recorder ; that in March following, Carey sold and conveyed his interest in the claim to Ireton and Chizum ; and these latter about March 1st, 1877, sold and conveyed their interests to one Thomas F. Mahan, who in December following sold and conveyed the claim to the defendant.

That in the sale to Mahan, Ireton claimed and assumed to act as the attorney in fact of Chizum, without written authority. That Mahan took possession of the Bobtail claim at the time of Ireton's conveyance and began work thereon and was developing the same. That on March 15th, 1877, and while so in possession he re-located the claim in his own name, and in his own right as the Bobtail lode, believing himself to be the owner, and had the location certificate recorded in the records of the Whitewood Quartz Mining District in said Lawrence County, on the same, or on the following day ; and, in the office of the Register of Deeds of said county, about the 12th of May following.

5. That there was a non-joinder of parties defendant in this action in this : After the commencement of this action, and before the substitution of the plaintiff, said Mahan acquired by purchase and deed from Chizum, all his right, title and interest in the Bobtail lode, and one or the other was a necessary party to a complete determination of the controversy.

6. That the former plaintiffs, Heffron, Curlin, Mannnig and Lynch, went within the surface lines of the Bobtail lode claim in June, 1876, pretended to make a discovery of gold-bearing ore, and made a pretended location there of the so-called Caledonia claim, within the prior location of the Bobtail lode claim, which conflicted and still conflicts with the same to the extent of three and 57-100 acres and, that said pretended Caledonia location was and is invalid.

7. That before and at the time of the substitution of the present plaintiff in this action, the defendant Noonan and Thomas F. Mahan were the owners of the said Bobtail lode — the metes and bounds, courses and distances of which are particularly given, and embrace an area of nine and 23-100 acres. That the plaintiff has wrongfully and unlawfully entered upon the same and mined and removed therefrom about 20,000 tons of gold-bearing ore of the value of nine dollars per ton — the property of the defendant and Thomas F. Mahan, and has converted the same to its own use to the damage of the defendant and Mahan in the sum of one hundred thousand dollars, for which sum judgment is asked. A decree is prayed that as against the plaintiff, the defendant be adjudged the owner of the Bobtail lode, and entitled to the possession of the ground in controversy. (*Pr. record, pp. 15, 16, 17 and 18.*)

The case came on for trial in the District Court on July 12th, 1880, on the issues raised by the complaint and answer. (*Pr. record, pp. 67 and 69*). On the fourth day, July 15th, the court by consent of the plaintiff and defendant ordered Thomas F. Mahan made a party defendant in the action. (*Pr. record, pp 25 and 26.*) The evidence, oral and written, was introduced, argument of counsel concluded, and the case submitted, Aug. 4th, 1881. The court rendered its decision and filed its findings of fact and conclusions of law September 13th, 1880, in favor of plaintiff. (*Pr. record, p. 45.*)

The defendants moved to correct the findings and conclusions, but the court denied the motion November 29th, 1880. (*Pr. record, pp. 53 and 55.*)

On the same day the defendants served a motion for a new trial. (*Pr. record, p. 56.*) which was overruled March 9th, 1881. Mahan had voluntarily appeared but there was no pleading in the case making him a party defendant. On December 14th, 1880, an "Amendment of Complaint" was served and filed in which his name appears as a defendant. (*Pr. record, p. 26.*)

The motion for a new trial was argued and submitted January 10th and 11th, 1881. (*Pr. record, pp. 56 to 66.*)

While this motion was under judicial consideration, the plaintiff served and filed, what it calls, a replication. (*Pr. record, p. 18 to 25.*)

March 9th 1881, upon overruling the motion for a new trial the court rendered judgment in favor of plaintiff and against the defendants John Noonan and Thomas F. Mahan for the possession of the ground in controversy.

From the orders, decisions and judgment of the court the defendants appealed to the supreme court of the Territory of Dakota. (*Pr. record, p. 1.*) The Supreme Court of the territory affirmed the findings and judgment of the district court in all things. (*Pr. record, pp. 314 and 315.*

From this last judgment the defendants have appealed to this court: (*Pr. record, pp. 324 and 325.*) with the expectation and hope of procuring a reversal of the judgment for errors of record, and a direction, that after consideration of the whole case, judgment may be ordered for the defendants.

Mahan had voluntarily appeared, and through counsel joined in the motion to correct the findings of fact and conclusions of law; and also in the motion for a new trial, as a defendant. But there was no pleading served or filed

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in the case containing his name as a defendant, until December 14th, 1880 — five months after the order making him a party, when an "Amendment of Complaint" was served. Pr. *record, p. 26.*

The only way the plaintiff could make Mahan a party to the record in the case after his appearance, so as to bind him by a judgment was to serve him with an amended pleading in which his name should be *added*, as a defendant; and it could only have judgment against him after his appearance, by stating a cause of action against him, in the amended complaint.

The only pleadings authorized by the Dakota code, are: Complaint, demurrer, answer, reply, and supplemental pleading. Courts may not provide additional ones, or change the rules of pleading, as that would be invading the legislative domain, and disturbing the uniformity of procedure.

We here call attention to the act of congress entitled "An act concerning the practice in territorial courts and appeals therefrom," approved April 7th, 1874, which gives to the legislative assemblies the power to enact uniform codes of procedure, and rules of practice in the territorial courts.

THE JUDGMENT IN THIS CASE IS NOT SUSTAINED BY THE PLEADINGS.

This is the first question to which the attention of the supreme court of Dakota was directed, and was glibly passed over as an "irregularity," at most, which defendants' counsel could have had corrected in the trial court, if its attention had been called to it.

The right of a defendant to raise for the first time, on appeal, objection to the jurisdiction of the trial court, and to question whether the plaintiff's pleading — be it original complaint, or amended, or substituted complaint, on the ground that it does not state facts sufficient to constitute

a cause of action against the defendant, needs no citation of authority.

July 12, 1880. — Case called for trial; only pleadings; amended and substituted complaint and Noonan's answer to the same. (*Pr. record, p 67*)

July 15 — Order of court by consent, making Mahan a party defendant. (*Pr. record, p. 25.*)

The order of the court did not, and could not, of itself, make him a party, but authorized his being made a party, which could be done only in one of two ways: by the service of summons on him, or by his voluntary appearance in the action. He chose to appear voluntarily.

Nov. 29 — By counsel he joins with Noonan as a defendant in a motion to correct findings of fact and conclusions of law. (*Pr. record, p 53.*)

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Neither of the defendants make answer to this last pleading, but make default. (*See pr. record 18.*)

Feb. 2, 1881 — Plaintiff serves a "replication." (*Pr. record, p 25.*)

March 9, 1881 — Motion for new trial overruled and judgment rendered against defendants, from which they appeal. (*Pr. record, pp 66 and 67.*)

Neither "replication" nor "amendment of complaint," by these names, are known to the Dakota code. But the one was intended to *do duty*, as a reply, and the other as an amended complaint. We treated them as such in the District and Supreme Court of the territory, and we treated them so here. No other view of it will accord with our practice, that the pleading amended must be entirely re-written with the amendments properly incorpe-

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rated, so as to make it complete in itself; and where the original pleading is necessarily verified the amended pleading must also be verified.

"Every pleading in a court of record must be subscribed by the party or his attorney; and when any pleading is verified every subsequent pleading, except a demurrer, must be verified also." (*Code, Civil Procedure, Dakota, § 125.*)

The Territorial Supreme Court in passing upon this case said: "And it is also true that the mode of making amendments of pleadings recognized by *our* practice is by *re-writing* the pleading, leaving out such allegations [and inserting such other allegations] as may be desired, so that all the parts of the pleading shall be *one* instrument or paper, and *be complete in itself.*" (*Pr. record, 318*)

"New parties may be brought in by service of an amended summons or by voluntary appearance; and issue must be joined as to such new parties, or their default taken, before the case is in a position to be brought to trial as *to the parties already in.* When new parties are added the plaintiff should be left to conduct his proceedings regularly at *his own peril.*"

(WALKENSHAW VS. PERZEL, 32 HOW. PR. 310.)

The plaintiff proceeded in this case, in its own way, served such pleadings as it was advised by its attorneys, were requisite and when they thought proper; and it did so at its own peril. Defendants' counsel were under no legal or moral obligation (as the Dakota Supreme Court seems to intimate they were) to intrude upon opposite counsel and the trial court views of procedure different from those that were pursued.

"The amended and substituted complaint" of plaintiff was not served upon defendant Mahan. The only pleading served upon him or filed in the case was the "amendment of complaint" or amended complaint as it should be called.

"If the defendant give notice of appearance in the action before the expiration of the statutory time for answering, he shall be entitled to eight days notice of the time and place of application to the court for the relief demanded in the complaint."

C. C. Proc. Subd. 2 Sec. 229,

The defendant has thirty days in which to answer the complaint after its service upon him.

C. C. Proc. Sec. 99.

Neither of the defendants answered this last complaint, but made default. Judgment was entered against both without the notice required by subd, 2, section 229 of the Dakota code of proceedence. The method of entering was an irregularity ; but the judgment itself is something worse — it is not sustained by the complaint, and hence, could rightfully be questioned for the first time in the Dakota Supreme Court, and can be questioned now, in this.

The District Court obtained jurisdiction over Mahan by his voluntary appearance ; but jurisdiction alone will not support a judgment. Some one must complain as plaintiff in the prescribed manner ; and the law which prescribes the mode and its sufficiency, allows the defendant a reasonable time to answer, if he deems the allegations in the complaint sufficient. In this case Mahan could not well answer until plaintiff's pleading making him a party was served upon him ; or filed in court. On December 14, 1880, he was first served with a pleading by the plaintiff. He was named a defendant therein. But this pleading, while it states no cause of action against him, or against any one else, superseded the previous pleadings of the plaintiff as the "amended and substituted complaint" of plaintiff superseded the previous pleadings in the action.

"When a pleading is amended the original pleading *ceases* to be a part of the record, because the party having the power has elected to make the change." (*Brown*

vs, Saratoga Railroad Company, New York (Court of Appeals 495.)

"An amended pleading takes the place of and supersedes the original, and the latter is no longer treated as a pleading."

(*Seneca County Bank vs. Garlinghouse et al. 4 How. Pr. 174; Kapp vs. Barthaw 1 E. D. Smith, 622; Burrall vs. Moore, 5 Duer 654.*)

"An amended complaint takes the place of the original, and when it is filed the original ceases to perform any further functions as a pleading." (*Barber vs. Reynolds 33 Cal. 497.*)

"It (amended pleading) supersedes, also, every demurrer, answer or reply to the original pleading, and renders them *nullities*, so far as relate to the issues to be tried upon the amended pleadings." (*Fry vs. Bennett, 3 Bos. 200.*)

See Gilman vs. Cosgrove, 22 Cal. 246.
Jones vs. Frost, 28 Cal. 346.

That this is the rule of law, and of practice in Dakota, we cite in proof the opinion of the Supreme Court of that territory, in this case:

"It is quite true "they say" that an amended pleading takes the place of the pleading amended, and that the original drops out of, and ceases to be a part of the record; and it is also true, that the *mode* of making amendments of pleadings recognized by *our practice*, is by *re-writing* the pleading, leaving out such allegations [*and inserting such other allegations] as may be desired, so that all the parts of the pleading shall be *one* instrument or paper, and be *complete in itself.*" (*Pr. record, 318.*)

The law and the practice of the courts in Dakota as to the effect of amendments on previons pleadings, are sim-

* The words in brackets are omitted in printed record, but are a part of the published opinion of the court.

ilar to those of New York and California. Before the act of congress of April 7, 1874, relating to the "Practice in Territorial Courts, and appeals therefrom" courts were not agreed as to the power of the legislative assemblies to enact codes and rules of practice or establishing a uniform course of proceedings in the Territorial Courts. There ought, no longer, be any doubt that the enactment of a "code of civil procedure" that is uniform, is fairly within the legislative power; and, that the expositors of the law are bound by its provisions, definitions and limitations as well as litigants.

The legislative authority of Dakota, says: "All forms of pleadings heretofore existing are abolished; and hereafter, the *forms* of pleadings in civil actions, in courts of record, and the *rules* by which the *sufficiency* of the pleadings, is to be determined, are those prescribed by this act." (*Code of Civil Procedure*, § *109.*)

"The first pleading on the part of the plaintiff is the complaint." (*Id*, § *110.*)

The complaint *shall contain:*

1. The title of the cause, specifying the name of the court in which the action is brought; the name of the county in which the plaintiff desires the trial to be had; and the names of the parties to the action plaintiff and defendant.

2. A plain and concise statement of the *facts* constituting a *cause of action*, without unnecessary repetition.

3. A *demand* of the relief to which the plaintiff supposes himself entitled. If the recovery of money be demanded the amount thereof shall be stated. (*Id* § *111.*)

Subsequent pleadings by the plaintiff, whether amended or substituted, are to be determined by the rules prescribed by the code. They must contain all that it requires, and may not omit the "statement of the facts constituting the cause of action," no matter how plain

and concise they have been stated in the previous pleading. This direction is mandatory.

Any pleading may be once amended by the party ; and the court may amend any pleading, that is: order or permit it to be amended.

Section 141 and 142 C. C. Proc.

The court from which this appeal is taken states the mode in Dakota to be "by re-writing the pleading. leaving out such allegations and inserting such other allegations as may be desired, so that all parts of the pleading shall be in one instrument or paper, and be complete in itself." In this way "the original drops out of, and ceases to be a part of the record."

An amendment may be made to any pleading process or proceeding by "adding" or "striking out" a name, correcting a mistake in a name, or in any other respect, or by *inserting* other allegations material to the case (§ 142 *C. C. Proc.*)

In this case the plaintiffs' "Amended and Substituted Complaint" is intact, and so is the "Amendment of Complaint" — two instruments when there should have been, as we contend and as the Territorial Supreme court declares — but one instrument or paper, complete in itself. There are two, and our contention is that the last one supersedes the former, as that one did the pleading preceeding it, and that the "Amended and Substituted Complaint" by operation of law dropped out and ceased to be a part of the record. If this position is correct then the complaint will not sustain the judgment.

Should the court however, not be inclined to take this view, but to hold that the "amended and substituted complaint" could be amended by a memorandum on a separate paper, and not incorporated into the pleading sought to be amended, there will be the anomalous spectacle of a part verified and a subsequent part unverified; and there

will be two, instead of one instrument or paper, neither of which is complete in itself.

Nevertheless, we contend that the judgment is not sustained by the amended and substituted complaint against the defendant Noonan, even if the "amendment of complaint" as a separate paper should be disregarded.

This is not strictly an action of ejectment, but a proceeding under the U. S. Revised Statutes to determine "the right to the possession" of the mining ground in dispute.

Sec. 910, 2326, U. S. Rev. Stat.

In Belk vs. Meagher (104 U. S. 283–4) this court said: "Congress has seen fit to make the possession of that part of the public lands which is valuable for minerals, separable from the fee, and to provide for the existence of an exclusive right to the possession, while the paramount title to the land is in the United States. In furtherance of this policy it was enacted by section 9 of the act of February 27th, 1865, c. 64 (13 Stat. 441, Rev. Stat. 910) that no possessory action between individuals in the courts of the United States for the recovery of mining titles should be affected by the fact that the paramount title to the land was in the United States, but that each case should be adjudged by the law of possession."

The possession must be lawful, that is to say: It must be by virtue of a valid location and claim to the mining ground, under the provisions of the mining acts of congress, or it must be by actual occupation *posessio pedis*. If a valid location has been effected, actual possession is not necessary. But in either case the facts constituting the plaintiff's right of possession should be concisely stated in the complaint.

The plaintiff's case is stated in the amended and substituted complaint, on the theory that a valid location of

the so called Caledonia lode was made by Lynch, Heffron, Curlin and Manning in June, 1876, and every subsequent act done—every step taken by the alleged locators and by their associates Lackey, Elliott, Morrow, O'Neill and Murphy is referred to and made dependent on the original location. As we shall see further on in the consideration of this matter, the alleged location of the Caledonia lode in 1876 was and is invalid and unlawful, the marking of trees and the setting up of boundary stakes as alleged was penal (*Sec. 2118 U. S. Rev. Stat.*); the presence there of the alleged discoverers and locators at the time alleged was in violation of treaty stipulations with the Indians, so that no legal rights could flow or result from the discovery of the lode, the marking of the boundaries of the claim, the posting and record of the location notice, and the work and development done, prior to February 28th, 1877.

Nor could these illegal acts be transformed into lawful ones by making an additional and supplementary claim, and an additional and supplementary location of said Caledonia location in March, 1877. All things pleaded as having been done prior to February 28th, 1877, were illegalities and nullities—not merely irregularities, and must therefore be treated as if they had never been done.

On March 15th, 1877, there was nothing to amend or supplement in the matter of claim and location of the Caledonia lode, and it is nowhere alleged in this pleading that any steps were taken to discover and locate the alleged ground in controversy on or after February 28th, 1877. Everything pertaining to acts of location are by the terms of the allegations referred to and made dependent upon what had been done before. No new or independent location is averred as having been made at any period when it was lawful to make a location.

An analysis of the amended and substituted complaint will show this:

It begins with a recital of the substitution of plaintiff for the original plaintiffs, and the destruction or loss by fire of the last amended complaint and for cause of action against the defendant Noonan alleges:

1. Incorporation in California of plaintiff.

2. That the former plaintiffs were the owners of the Caledonia lode on the 30th day of August, 1878; that the same was sold and conveyed by them to Thomas Bell, August 31st, 1878; and that he sold and conveyed the same to the plaintiff December 10th, 1878.

3. Location of Caledonia lode in June, 1876; and an additional and supplementary claim and location March 15th, 1877.

4. Continuous ownership of the lode from June 21st, 1876, by former plaintiffs, their grantors and predecessors in interest until sale to Bell; Bell's succession to their titles and rights; and plaintiff's succession to all the titles and rights to said claim ever since the 21st of July, 1876.

5. That defendant Noonan claimed some right or title adverse to plaintiff in a portion of the Caledonia lode—describing the portion.

6. That Noonan's claim of title was by virtue of an alleged invalid Bobtail lode claim made in February, 1876.

7. That defendant Noonan applied for a U. S. patent April, 1878; was adversed by the former plaintiffs in May following, and this action was begun June 14, 1878.

8. That defendant's claim of an estate or interest in the portion of the Caledonia lode—the ground in controversy—casts a cloud on plaintiff's title.

9. That the diagram annexed to the original complaint is correct.

Prayer for relief.

Verification.

Printed Record 10, 11, 12, 13, 14.

Had there been only an averment of ownership in the plaintiff, and an allegation of withholding by the defendant that would have been sufficient. But the source of ownership is pleaded and traced, so that its illegality is quite apparent, from an inspection of the record. In our judgment the complaint does not state facts sufficient to constitute a cause of action; but we think it states facts sufficient to show that plaintiff has no cause of action, and can have none, the title averred having its inception in the alleged Caledonia location.

"Error of record ascertainable from an inspection, may be first urged in the appellate court."

Dole vs. Burleigh, 1 Dakota, 227.

"Errors patent upon the record are open to review in this court, without exception taken in the District Court; and such errors must be determined by an inspection of the record."

Galloway vs. McLean, 2 Dakota 372.

"Every fact necessary to enable the court to pronounce an accurate and lawful judgment, must appear on the face of the complaint; and the decree must conform to such allegations, and cannot go a step beyond them: and this rule is not only one which justice requires, but one which necessity imposes on courts."

Nation et al, vs. Cameron 2 Dakota, 348

ASSIGNMENT OF ERROR.

In the District Court the action was tried upon the issues raised by the amended and substituted complaint of the plaintiff and the answer of the defendant John Noonan, and the assignments of error, are as follows:

1. The judgment and decree is not sustained by the pleadings.

2. The court erred in admitting in evidence against defendant's objection the copy of the Articles of Incorpora-

IN THE

Supreme Court of the District of Columbia.

October Term 1886.

JOHN NOONAN and THOMAS F. MAHAN
Appellants,
vs.
THE CALEDONIA GOLD MINING COMPANY, Respondents.
No. 170.

Appellants' counsel will rely in this court upon the following assignments of error, of the number printed in the brief of appellants, without abandoning any of the others:

I.

Brief No. 1. That the judgment and decree is not sustained by the pleadings.

Printed Record, 10 *to* 26, *inclusive.*

II.

Brief No. 2. That the court erred in admitting in evidence against the defendants' objection the copy of the "ARTICLES OF INCORPORATION OF THE CALEDONIA GOLD MINING COMPANY," marked Exhibit "A," as the same is incompetent, immaterial, and irrelevant.

Printed Record, 70, 71, 72.

III.

Brief No. 12. That the court erred in admitting in evidence against the defendants' objection the paper marked Exhibit "G," purporting to be a copy of the "SUPPLEMENTAL RECORD OF THE CALEDONIA LODE," from the mining records, as the same is incompetent, irrelevant, and immaterial.

Printed Record, 88, 89.

IV.

Brief No. 24. That the court erred in admitting in evidence against defendants' objection the deed of con-

veyance of date August 30th, 1878, purporting to have been made by Peter O'Neil, James Manning, Henry Lackey, James Lynch, Robert Curlin, John M. Murphy, Michael Heffron, Louis P. Elliott, and John Morrow, of Lawrence county, Territory of Dakota, to Thomas Bell, of the county of San Francisco, State of California, acknowledged before H. H. Mund, notary public, on the same date, and recorded in the register of deeds' office of Lawrence county, Dakota Territory, August 31st, 1878, in book 15, page 460, because the same is incompetent, immaterial, and irrelevant.

Printed Record, 110, 111.

V.

Brief No. 25. That the court erred in admitting in evidence against defendants' objection the deed from Thomas Bell, of the county of San Francisco and State of California, to the Caledonia Gold Mining Company, dated September 17th, 1878, acknowledged before Edward Chattin, commissioner of deeds for Dakota, in San Francisco, California, and filed for record in the register of deeds' office in and for Lawrence county, Dakota Territory, September 25th, 1878, and recorded in book 24, pp. 50, 51, 52, and 53, because the same is immaterial, incompetent, and irrelevant.

Printed Record, 112, 113, *and* 114.

VI.

Brief No. 35. That the court erred in admitting in evidence against the defendants' objection the document marked Exhibit "I," signed with the names of James Lynch, Michael Heffron, Henry Lackey, Robert Curlin, Peter O'Neil, James Manning, John M. Murphy, Louis P. Elliott, and John Morrow, dated March 2d, 1878, filed for record in register of deeds' office, in Lawrence county, Dakota Territory, March 2d, 1878, and recorded in book 13, p. 392,

as the same is incompetent, irrelevant, and immaterial.

Printed Record, 130, 131.

VII.

Brief No. 40. That the court erred in admitting in evidence against defendants' objection a pretended copy of the deposition of D. G. Chizum, purporting to have been taken on April 12th, 1879, before J. J. Kreitzlir, notary public at Glasgow, Jefferson county, State of Iowa, as the same is incompetent, irrelevant, and immaterial.

Printed Record, 244 *to* 250.

VIII.

Brief No. 67. That the court erred in admitting in evidence against defendants' objection testimony on the part of plaintiff, to wit: the testimony of Michael Lynch and sundry other witnesses, showing acts done, statements and declarations made, in relation to the alleged discovery and location of the so-called Caledonia lode on the east side of Schumache Gulch, Lawrence county, Dakota Territory, in the year 1876, and prior to the 28th day of February, 1877, and in considering the same and making findings of fact thereon, as the same is incompetent by reason of the then existence of an Indian reservation embracing the Black Hills, in which said locality is situated, and which was not open to exploration and settlement at that time.

Printed Record, 78 *et seq.*

IX.

Brief No. 68. That the court erred in admitting in evidence testimony on the part of the plaintiff, to wit, the testimony of Michael Lynch and sundry other witnesses, showing acts done, statements and declarations made, in relation to the discovery and location of the so-called Caledonia lode on the east side of Schumache Gulch, Lawrence county, Dakota Territory, in the year 1876, and prior to the 28th day of February, 1877, and in considering the same

and finding conclusions of law thereon, as the same is incompetent by reason of the then existence of an Indian reservation embracing the Black Hills, in which said locality is situated, and which was not open to exploration and settlement at that time.

Printed Record, 78 *et seq.*

X.

Brief No. 70. The court erred in making finding No. 3, that the miners of Whitewood Quartz Mining District established said district, and adopted rules as set out in said finding, on the 30th day of December, 1876, as no body of miners could lawfully have formed a district or made rules and regulations in this portion of Dakota Territory at that time by reason of its being a part of an Indian reservation.

XI.

Brief No. 71. The court erred in making finding No. 4, that Michael Heffron, Michael Lynch, Robert Curlin, and James Manning discovered and located the Caledonia lode in the month of June, 1876, on the east side of Schumache Gulch, in Lawrence county, Dakota Territory, as the locality of said Caledonia lode was at that time within the limits of an Indian reservation, and was not open to exploration, occupation, or settlement.

XII.

Brief No. 74. The court erred in making finding No. 6, as there was no competent legal proof of the so-called original staking of the Caledonia lode in June, 1876, and consequently its boundaries could not have been marked by such stakes on February 28th and March 1st, 1887, nor could there have been any discovery shaft thereon on such dates by reason of any prior working thereon; and such finding is not sustained by sufficient evidence, and is against law.

DANIEL MCLAUGHLIN and
WILLIAM R. STEELE,
Attorneys for Appellants.

tion of the Caledonia Gold Mining Company marked Exhibit "A," as the same is incompetent, immaterial and irrelevant.

3. The court erred in admitting in evidence against defendant's objection the second copy of the articles of incorporation of the Caledonia Gold Mining Company, certified to by George H. Hand, Secretary of Dakota Territory, marked Exhibit "B," as the same is incompetent, immaterial and irrelevant.

4. The court erred in admitting in evidence against defendant's objection the copy of the resolution of appointment of A. J. Rigby, as resident agent of plaintiff, marked Exhibit "C,,' as the same is incompetent, irrelevant and immaterial.

5. The court erred in admitting in evidence against defendant's objection the copy of appointment of A. J. Rigby as resident agent of plaintiff, marked Exhibit "D," and certified to by George H. Hand, Secretary of the Territory of Dakota, as the same is incompetent, immaterial and irrelevant.

6. The court erred in admitting in evidence against the defendant's objection the testimony of Michael Lynch, in relation to acts done in connection with the co-called Caledonia lode location, on the easterly side of Shumache Gulch, in Lawrence County, Dakota Territory, prior to the 28th day of February, 1877, as the same is incompetent and immaterial.

7. The court erred in admitting the testimony of J. M. Murphy in evidence against defendent's objection in relation to customs of recording quartz claims with a district mining recorder of the so-called Whitewood Quartz Mining District, prior to February 28th, 1877, as incompetent and immaterial.

8. The court erred in admitting in evidence against the defendant's objection the testimony of J. M. Murphy in relation to a record of the location certificate of the so-

called Caledonia lode, made and recorded by the said Murphy as deputy recorder of said Whitewood Quartz Mining District, on or about March 15th, 1877, as the same is immaterial, irrelevant and incompetent.

9. The court erred in admitting in evidence against the defendant's objection, the testimony of J. M. Murphy in relation to the contents of the location certificate of the Caledonia lode in 1876, and the record thereof during that year, in the records of the Whitewood Quartz Mining District, as the same was immaterial and incompetent.

10. The court erred in admitting in evidence against the defendant's objection, the testimony of J. M. Murphy in relation to a supplementary notice and record of the Caledonia lode, made on or about the 15th day of March, 1877, in the records of the Whitewood Quartz Mining District, as the same is immaterial, irrelevant and incompetent.

11. The court erred in admitting in evidence against the defendant's objection, paper marked Ex. "E," purporting to be a copy of the location notice of the Caledonia lode, dated Gayville, June 21st, 1876, filed for record June 21st, 1876, with copy of affidavit of James B. Carr attached that it is a true copy of the record of the said notice in the mining records of the said Whitewood Quartz Mining District, and certified to be a true copy of the original on file in the United States Land Office, at Deadwood, D. T., by A. S. Stewart, Register, as the same is immaterial, irrelevant and incompetent.

12. The court erred in admitting in evidence against the defendant's objection, paper marked Exhibit "G," purporting to be a copy of the supplementary record of the Caledonia lode from the mining records, as the same is incompetent, irrelevant and immaterial.

13. The court erred in admitting in evidence against the defendant's objection, paper marked Exhibit "H,"

and purporting to be a copy of a record made September 27th, 1877, to correct error in the number of feet claimed in the Caledonia lode, as the same is irrelevant and incompetent.

14. The court erred in admitting in evidence against defendant's objection, the testimony of the witness Henry Lackey, in relation to acts done in connection with the so-called Caledonia lode, location, existence of boundary stakes, work and notices, prior to the 28th day of February, 1877, as the same are immaterial, irrelevant and incompetent.

15. The court erred in admitting in evidence against defendant's objection, the testimony of the witness John Dawson in relation to acts done, boundary stakes, amount of work, and notices in connection with the so-called Caldonia lode, prior to February 28th, 1877, as the same is immaterial, irrelevant and incompetent.

16. The court erred in admitting in evidence against defendant's objection, the testimony of Robert W. Cooper in relation to acts done, boundary stakes, amount of work done and notices in connection with the so-called Caledonia lode, prior to February 28th, 1877, as the same is immaterial, irrelevant and incompetent.

17. The court erred in admitting in evidence against defendant's objection the testimony of the witness Robert Curlin, in relation to acts done, boundary stakes, amount of work done and notices in connection with the so-called Caledonia lode, prior to February 28th, 1877, as the same is immaterial, irrelevant and incompetent.

18. The court erred in admitting in evidence against defendant's objection, the testimony of the witness William Gunn, in relation to acts done, boundary stakes, amount of work done and notices in connection with the

so-called Caledonia lode prior to February 28th, 1877, as the same is immaterial, irrelevant and incompetent.

19. The court erred in admitting in evidence against defendant's objection the testimony of the witness Matthew Moore in relation to acts done, boundary stakes, amount of work done and notices in connection with the so-called Caledonia lode prior to February 28th, 1877, as the same is immaterial, irrelevant and incompetent.

20. The court erred in admitting in evidence against defendant's objection the testimony of the witness James Lynch, in relation to acts done, boundary stakes, amount of work done and notice in connection with the so-called Caledonia lode, prior to February 28th, 1877, as the same is immaterial, irrelevant and incompetent.

21. The court erred in admitting in evidence against defendant's objection, the testimony of the witness Michael Heffron, in relation to acts done, boundary stakes, amount of work done and notice in connection with the so-called Caledonia lode, prior to the 28th day of February, 1877, as the same is immaterial, irrelevant and incompetent.

22. The court erred in admitting in evidence against defendant's objection the testimony of the witness James Carney in relation to acts done, boundary stakes, amount of work done and notice in connection with the so-called Caledonia lode prior to February 28th, 1877, as the same is immaterial, irrelevant and incompetent.

23. The court erred in admitting in evidence against defendant's objection the testimony of the witness James Carney on behalf of plaintiff as to what he did and knew after the 28th day of February, 1877, in relation to the so-called Caledonia lode, as the same is immaterial, irrelevant and incompetent.

24. The court erred in admitting in evidence against defendant's objection the deed of conveyance of date

August 30th, 1878, purporting to have been made by Peter O'Neill, James Manning, Henry Lackey, James Lynch, Robert Curlin, John M. Murphy, Michael Heffron, Louis P. Elliott and John Morrow, of Lawrence County, Territory of Dakota, to Thomas Bell, of the County of San Francisco, and State of California, acknowledged before H. H. Mund, Notary Public, on the same date and recorded in the Register of Deeds office of Lawrence County, Dakota Territory, August 31st, 1878, in book 15, page 460, because the same is immaterial, incompetent and irrelevant.

25. The court erred in admitting in evidence against defendant's objection the deed from Thomas Bell, of the County of San Francisco, and State of California, to the Caledonia Gold Mining Company dated September 17th, 1878, before Edward Chattin, Commissioner for Dakota in San Francisco, California, and filed for record in the Register of Deeds office in and for Lawrence County, Dakota Territory, September 25th, 1878, and recorded in book 24, pp. 50, 51, 52 and 53, because the same is immaterial, incompetent and irrelevant.

26. The court erred in admitting in evidence against defendant's objection, the deed from Thomas Bell, of the County of San Francisco and State of California, to the Caledonia Gold Mining Company, dated December 10th 1877, acknowledged December 10th, 1878, before Edward Chattin, Commissioner for Dakota in San Francisco, California, and filed for record in the Register of Deeds office, in and for Lawrence County, D. T., December 18th, 1878, and recorded in book 24, page 351, because the same is immaterial, incompetent and irrelevant.

27. The court erred in admitting in evidence against defendant's objection the testimony of the witness William H. Workman, in relation to acts done, boundary stakes, amount of work done and notice in connection with the so-called Caledonia lode prior to February 28th,

1877, as the same is immaterial, irrelevant and incompetent.

28. The court erred in admitting in evidence against defendant's objection the testimony of the witness William H. Workman, on behalf of plaintiff, as to what he did and knew after the 28th day of February, 1877, in relation to the so-called Caledonia lode, as the same is immaterial, irrelevant and incompetent.

29. The court erred in admitting in evidence against defendant's objection, the testimony of the witness P. A. Gushurst, in relation to acts done, boundary stakes, amount of work done, and notice in connection with the so-called Caledonia lode prior to February 28th, 1877, as the same is immaterial, irrelevant and incompetent.

30. The court erred in admitting in evidence against defendant's objection the testimony of the witness P. A. Gushurst on behalf of plaintiff as to what he did and knew after the 28th day of February, 1877, in relation to the so-called Caledonia lode, as the same is immaterial, irrelevant and incompetent.

31. The court erred in admitting in evidence against defendant's objection the testimony of the witness John O'Neil, as the same is incompetent, irrelevant and immaterial.

The court erred in admitting in evidence against defendant's objection the so-called rules and regulations of the pretended Whitewood Quartz Mining District, purporting to have been adopted at a miners' meeting at Gayville, December 31st, 1876, presided over by D. E. Costigan, president, as the same are incompetent, irrelevant and immaterial. Also, in admitting purported proceedings of a miners' meeting of March 6th, 1877, S. P. Romans, chairman. Also, in admitting purported proceedings of a miners' meeting of May 10th, 1877, S. P. Romans, chairman. Also, in admitting purported

proceedings of a miners' meeting June 8th, 1877, J. H. S. Coleman, chairman. Also, in admitting purported proceedings September 7th, 1877, of a miners' meeting W. H. Brown, chairman, as all these proceedings are immaterial, irrelevant and incompetent.

33. The court erred in admitting in evidence against defendant's objection the testimony of the witness Louis P. Elliott, as the same is immaterial, irrelevant and incompetent.

34. The court erred in admitting in evidence against defendant's objection the testimony of the witness W. L. Smith in relation to document marked Exhibit "A," purporting to be a re-location of the Caledonia lode by metes and bounds made March 2nd, 1878, as the same is incompetent and irrelevant.

35. The court erred in admitting in evidence against defendant's objection the document marked Exhibit "I," signed with the names of James Lynch, Michael Heffron, Henry Lackey, Robert Curlin, Peter O'Neill, James Manning, John M. Murphy, Louis P. Elliott and John Morrow, dated March 2d, 1878, filed for record in Register of Deeds office in Lawrence County, D. T., March 2d, 1878, and recorded in book 3, page 392, as the same is incompetent, irrelevant and immaterial.

36. The court erred in admitting in evidence against defendant's objection the testimony of the witness Thomas S. O'Neill in relation to matters connected with the so-called Caledonia lode prior to February 28th, 1877, as the same is incompetent, immaterial and irrelevant.

37. The court erred in admitting in evidence against the defendants objection the testimony of the witness Michael Lynch as to value of work done on Caledonia lode prior to February 28th, 1877, as the same is incompetent and irrelevant.

38. The court erred in admitting in evidence against defendant's objection the diagram marked Exhibit "E," (map made by H. C. Bohleder showing two Bobtail loca-

tions, one 300 feet and the other 600 feet in width) as the same is incompetent, irrelevant and immaterial.

39. The court erred in admitting in evidence against defendant's objection the deposition of W. R. Keithly, containing Exhibits marked "A," "B," "C," "D," "E," "F," "G," and "H," as the same is incompetent, irrelevant and immaterial.

40. The court erred in admitting in evidence against defendant's objection a pretended copy of the deposition of D. G. Chisum, purporting to have been taken on April 12th, 1879, before J. J. Kreitzler, Notary Public at Glascow, Jefferson County, State of Iowa, as the same is incompetent, irrelevant and immaterial.

41. The court erred in admitting in evidence against the defendant's objection the depositions of the witness D. G. Chizum, to-wit: that of April 17th, 1879, that of January 10th, 1880, and that of May 10th, 1880, as the same are incompetent, irrelevant and immaterial.

42. The court erred in admitting in evidrnce against defendant's objection the testimony of the witness Michael Gibbons as to acts, statements and declarasions of parties in relation to Clara Hill, Clara No. 2, Clara No. 1, Bobtail and Caledonia lodes prior to February 28th, 1877, as the same is incompetent, immatersal and irrelevant.

43. The court erred in admitting in evidence agaist defendant's objection the testimony of the witness William Gunn as to acts done, statements and declaraiions made prior to February 28th, 1877, relative to Clara Clara No. 2, Bobtail, Caledonia and Queen of the Hills locations, as the same is incompetent, immaterial and irrelevant.

44. The court erred in admitting in evidence against defendant's objection the testimony of the witness William Gunn relative to acts done, statements and declarations made by himself, Mathew Moore, Michael Gibbons and Thomas F. Mahan relative to Clara No. 2 lode after

February 28th, 1877, as the same is incompetent, irrelevant and immaterial.

45. The court erred in admitting in evidence against defendant's objection the testimony of the witness Mathew Moore as to acts done, statements and declarations made prior to February 28th, 1877, relativa to Clara No. 2, Bobtail, Caledonia and Queen of the Hills locations, as the same is incompetent, irrelevant and immaterial.

46. The court erred in admitting in evidence against defendant's objection the testimony of the witness Mathew Moore as to acts done, statements and declarations made by himself, William Gunn, Michael Gibbons and Thomas F. Mahan relative to Clara No. 2 lode after February 23th, 1877, as the same is incompetent, immaterial and irrelevant.

47. The court erred in admitting in evidence against defendant's objection the testimony of the witness John Manning as to acts done, declarations and statements made by Thomas F. Mahan, William Gunn, Michael Gibbons and himself in relation to Clara No. 2 lode prior to February 28th, 1877, as the same is incompetent, immaterial and irrelevant.

48. The court erred in admitting in evidence against defendant's objection the testimony of the witness John Manning as to acts done, declarations and statements made by Thomas F. Mahan, Mathew Moore, William Gunn, Michael Gibbons and himself in relation to Clara No. 2 lode and Thomas H. Carr getting drunk after February 28th, 1877, as the same is incompetent, irrelevant and immaterial.

49. The court erred in admitting in evidence against defendant's objection the testimony of the witness Robert W. Cooper as to acts done, declarations and statements made by Thomas F. Mahan, William Gunn, Michael Gib-

bons and himself in relation to Clara No. 2, Grand Prize, Queen of the Hills and Bobtail lodes prior to February 28th, 1877, as the same is incompetent, irrelevant and immaterial.

50. The court erred in admmitting in evidence against defendant's objection the testimony of the witness Robert W. Cooper as to acts done, declarations and statements made by Thomas F. Mahan, Mathew Moore, William Gunn, Michael Gibbons and himself in relation to Clara No. 2, Grand Prize, Queen of the Hills and Bobtail lodes, as the same is incompetent, irrelevant and immaterial.

51. The court erred in admmitting in evidence against defendant's objection the testimony of the witness John Mahan, as the same is incompetent, irrelevant and immaterial.

52. The court erred in admitting in evidence against defendant's objection the testimony of the witness William H. Claggett, as the same is incompetent, irrelevant and immaterial.

53. The court erred in admitting in evidence against defendant's objection the testimony of the witness Michael Lynch, on being re-called, as to acts done, declarations and statements made prior to February 28th, 1877, relative to the Caledonia, Clara No. 2, Bobtail and Empire lodes, as the same is incompetent, irrelevant and immaterial.

54. The court erred in admitting in evidence against defendant's objection the evidence of the witness J. G. Maclay, as the same is incompetent, irrelevant and immaterial.

55. The court erred in admitting in evidence against defendant's objection the testimony of the witness P. A. Gushurst in relation to what he did and said prior to February 28th, 1877, as the same is incompetent, irrelevant and immaterial.

56. The court erred in admitting in evidence against defendant's objection the testimony of the witness Charles E. Barney in relation to all that he did and said prior to February 28th, 1877, as the same is incompetent, immaterial and irrelevant.

57. The court erred in admitting in evidence against defendant's objection the testimony of the witness William H. Workman, on being re-called, as to what he did and said prior to February 28th, 1877, as the same is incompetent, irrelevant and immaterial.

58. The court erred in admitting in evidence against defendant's objection the testimony of the witness Henry Lackey, on being recalled, as the same is incompetent, irrelevant and immaterial.

59. The court erred in admitting in evidence against defendant's objection the testimony of the witness Squire C. Chizum, as the same is incompetent, irrelevant and immaterial.

60. The court erred in admitting in evidence against defendant's objection the testimony of the witness Wade Porter, as to conversation with Henry S. Ireton, on the 10th of March, 1877, relative to Ireton giving up the Bobtail claim—had not done the work to hold it—as it is incompetent, irrelevant and immaterial.

61. The court erred in admitting evidence against defendant's objection to the deposition of Henry S. Ireton, taken at Wingfield, Cowley County, State of Kansas, before E. J. Bedilion, October 16th, 1878, as the same is incompetent, irrelevant and immaterial.

62. The court erred in admitting in evidence against defendant's objection, the testimony of the witness John Dawson, on being recalled, as to acts done, declarations and statements made relative to the so-called Caledonia, Clara No. 2 and Bobtail locations, prior to February 28th, 1877, as the same is incompetent, immaterial and irrelevant.

63. The court erred in admitting in evidence against defendant's objection the deposition of Francis Coyle, purporting to have been taken January 25th, 1879, before G. Graham Minor, Notary Public, Custer County, State of Colorado, as the same is incompetent, irrelevant and immaterial.

64. The court erred in admiting in evidence against defendant's objection the testimony of the witness J. M Murphy, on being recalled, after James B. Carr's testimony relative to his business and the recording of mining claims in the mining records of Thomas H. Carr, at Gayville, particularly the recording of the Caledonia, Queen of the Hills and Clara No. 2 locations, as the same is incompetent, immaterial and irrelevant.

65. The court erred in admitting in evidence against defendant's objection the testimony of the witness William Gunn on the part of plaintiff, as the same is immaterial and irrelevant.

66. The court erred in admitting in evidence against defendant's objection the testimony of the witness James F. Watson, on the part of plaintiff, as the same is immaterial and irrelevant.

67. The court erred in admitting in evidence against defendant's objection testimony on the part of plaintiff, to-wit: the testimony of Michael Lynch, and sundry other witnesses, showing acts done, statements and declarations made in relation to the alleged discovery and location of the so-called Caledonia lode on the east side of Schumache Gulch, Lawrence County, Dakota Territory, in the year 1876, and prior to the 28th day of February 1877, and in considering the same and making findings of facts thereon, as the same are incompetent by reason of the then existence of an Indian reservation embracing the Black Hills, in which said locality is situated, and which was not open to exploration and settlement at that time.

68. The court erred in admitting in evidence testimony on the part of plaintiff, to-wit: the testimony of Michael Lynch, and sundry other witnesses, showing acts

done, statements and declarations made in relation to the alleged discovery and location of the so-called Caledonia lode on the east side of Schumache Gulch, Lawrence County, Dakota Territory, in the year 1876, and prior to the 28th day of February, 1877, and in considering the same and in finding conclusions of law thereon, as the same is incompetent by reason of the then existence of an Indian reservation, embracing the Black Hills, in which said locality is situated, and which was not open to exploration and settlement at that time.

69. The court erred in making findiny No. 1 as a fact in this action that the Caledonia Gold Mining Company was a corporation, organized and existing under and by virtue of the laws of the State of California.

70. The court erred in making finding No. 3 that the miners of Whitewood Quartz Mining District established said district and adopted rules as set out in said finding on the 30th day of December, 1876, as no body of miners could lawfully have formed a district, or made rules and regulations, in this portion of Dakota Territory at that time by reason of its being a part of an Indian reservation.

71. The court erred in making finding No. 4 that Michael Heffron, Michael Lynch, Robert Curlin and James Manning discovered and located the Caledonia lode in the month of June, 1876, on the east side of Schumache gulch in Lawrence County, Dakota Territory, as the locality of said Caledonia lode was at that time within the limits of an Indian reservation, and was not open to exploration, occupation or settlemeni.

72. The court erred in admitting in evidence copies of location notices of the alleged Caledonia lode location to have been made, posted and recorded in a pretended mining record in June, 1876, upon an Indian reservation, upon which it was unlawful to enter, or settle prior to February 28th, 1877, as the same are incompetent.

73. The court erred in making finding No. 5 for the same reason as given for finding No. 4.

74. The court erred in making finding No. 6, as there was no competent legal proof of the so-called original staking of the Caledonia lode in June, 1876, and consequently its boundaries could not have been marked by such stakes on February 28th and March 1st, 1877, nor could there have been any discovery shaft thereon on said dates by reason of any prior working thereon. And said finding is not sustained by sufficient evidence and is against law.

75. The court erred in making finding No. 7, as the same is not supported by sufficient evidence.

76. The court erred in making finding No. 8, for the same reason as given for No. 7.

77. The court erred in making finding No. 9, as the same is not supported by sufficient evidence and is against law.

78. The court erred in making finding No. 10, as the same is immaterial and irrelevant.

79. The court erred in making finding No. 11, as the same is not supported by sufficient evidence and is immaterial.

80. The court erred in making finding No. 12, as no allegation of mistake in the record was alleged, and no reformation of the record was sought by plaintiff in the pleadings nor during the trial, and such finding is not pertinent to the issues raised by the pleadings and submitted to the court for trial.

81. The court erred in making finding No. 13, as the same is not supported by sufficient evidence.

82. The court erred in making finding No. 14, as the same is wholly immaterial and is not sustained by sufficient evidence.

83. The court erred in making finding No. 15, in so far as it finds value for any work done on the alleged Caledonia lode prior to the 28th of February, 1877.

84. The court erred in making findings 16 and 17, as they are immaterial.

85. The court erred in finding, as it did, in finding

No. 18. That James Manning, Robert Carlin, Michael Heffron, Peter O'Neil, Henry Lackey, James Lynch, John M. Murphy and Louis P. Elliott, who were then in possession of said Caledonia mining claim, sold and conveyed the same, by deed, to Thomas Bell, on the 30th of August, 1877, because the same is not supported by sufficient evidence, and that no title was acquired by Thomas Bell or his grantee, the plaintiff, by the deed mentioned of September, 17th, 1878, and the other conveyances.

86. The court erred in making finding No. 19, as the same is immaterial.

87. The court erred in its conclusions of law numbered respectively 1, 2, 3, 4, 5, 6 and 7.

88. The court erred in overruling the motion of defendants, filed herein November 29, 1880, requesting the court to correct its findings of fact and conclusions of law as therein required.

89. The decision of the court is not supported by sufficient evidence.

90. The decision of the court is against law.

BRIEF AND ARGUMENT.

The first assignment of error is, one first urged in the supreme court of Dakota, and now urged here; "That the judgment is not sustained by the pleadings."

The authorities and reasons to sustain this assignment, have already been given. If the authorities cited are pertinent and the reasoning correct, the prayer for a reversal of judgment should follow.

But as several other important questions of law, relating to the proper construction of certain of the statutes of Dakota, are involved in other assignments of error in this case, we hope that these will receive the consideration of the court.

The second assignment of error is:

"Admitting in evidence against defendant's objection the copy of the articles of incorporation of the Caledonia Gold Mining Company, Marked Exhibit A., as the same is incompetent, immaterial and irrelevant."

An inspection of this document (*Pr. record 70-71*) will show that it is a copy of a record or writing, certified by a deputy Secretary of State of California, under the seal of that state, of a purported copy from the office of the clerk of the city and county of San Francisco in that state, which is certified by a deputy, "to be a full, true and correct copy of the *original articles* of incorporation of the Caledonia Gold Mining Company, filed in my (that) office on the fourth day of September, 1878;" endorsed, 'Filed in the office of the Secretary of State, the fifth day of September, 1878. Thos. Beck, Sec'y of State, by Wm. A. Beck, deputy.' The deputy Secretary of State, Thomas A. Reynolds, certifies in terms that he has compared this copy of "Articles of incorporation of the Caledonia Gold Mining Company with the *original now on file* in my (that) office, and that the same is a correct transcript therefrom, and of the whole thereof." No attempt was made by the plaintiff to prove who was the *keeper* of the original articles of incorporation, or the "*keeper of the record* or books" where the original articles of incorporation were required by the laws of the State (if any there were) to be kept or filed. There is no showing or offer to show, that, in that State, the duties of the Secretary of State, or the duties of the Clerk of the City and County of San Francisco, could be legally performed by deputy. Whether or no, the deputies could lawfully perform the principals duties there, is not the principal objection. The main objection to the document is its incompetency, apparent on its face, and this was urged in the district court, and in the supreme court, as it is here. Under no conditions or circumstances could

it have been made legal evidence by the court, objection or no objection. It is not a question of degree of superior or inferior evidence, of best or secondary proof, of direct or hearsay testimony, as when inferior, secondary, or hearsay testimony is offered, and objected to, the court should be advised of the reasons why the superior, or better, or direct testimony should be adduced, so that it may rule out the inferior and order the best evidence produced.

In such instances the record should undoubtedly show the reasons urged by the objector. But when the document offered, cannot be received in evidence under any circumstances, that is to say: it is in no sense within any degree of lawful evidence, even if no objection is made to it, then no reason other than what appears in this record, is necessary, namely; that it is incompetent.

Every man is conclusively presumed to know the law—territorial judges included.

In the constitution of the United States this appears:

"This constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made under the authority of the United States shall be the SUPREME LAW OF THE LAND; and the Judges in every state shall be bound hereby, anything in the constitution or laws of any state to the contrary notwithstanding."

See Art. 6, Const. U. S.

A law of the United States, made in pursuance of the Constitution, reads as follows:

"All records and exemplifications of books, which may be kept in any public office of any State or Territory, or of any country subject to the jurisdiction of the United States, not appertaining to a court, shall be proved or admitted in any court or office in any State or Territory, or in any such country, by the attestation of the keeper of

the said records or books, and the seal of his office annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county, parish or district in which such office may be kept, or of the governor, or secretary of state, the chancellor or keeper of the great seal of the State, Territory or country, that the said attestation is in due form and by the proper officers. If the said certificate is given by the presiding justice of the court, it shall be further authenticated by the clerk or prothonotary of the said court, who shall certify under his hand and the seal of his office, that the said presiding justice is duly commissioned and qualified or, if given by such governor, secretary, chancellor, or keeper of the great seal, it shall be under the great seal of the State, Territory or country aforesaid in which it is made, and the said records and exemplifications, so authenticated, shall have such faith and credit given to them in every court or office within the United States as they have by law or usage in the courts or offices of the State, Territory or country as aforesaid from which they are taken."

(*Sec. 905 U. S. Rev. Stat.*)

All records and exemplifications of books which may be kept in any public office of any State or Territory * * * * * * not appertaining to a court, SHALL BE PROVED or ADMITTED in any court or office in any other State or Territory * * * by the ATTESTATION OF THE KEEPER of the said records or books, *and the seal of his office annexed*, if there be a seal, TOGETHER WITH a certificate of the presiding justice of the court of the county, parish or district in which such office may be kept, or of the governor, or secretary of state, the chancellor or keeper of the great seal of the State or Territory * * * that the said attestation IS IN DUE FORM AND BY THE PROPER OFFICERS. If the said certificate is given by * * * * * such

Governor, Secretary, Chancellor or keeper of the great seal—it shall be under the great seal of the State or Territory in which it is made. And the said records and exemplifications, SO AUTHENTICATED, shall have such faith and credit given to them in every court and office within the United States, as they have by law or usage in the courts or offices of the State or Territory * * * from which they are taken.

The "attestation" of the keeper of the record or books and the seal of his office, must be first had; and next a certificate that the ATTESTATION IS IN DUE FORM by the proper officer.

This is the only method by which "records and exemplifications of books which may be kept in any public office of any State or Territory," "shall be proved or admitted in any court or office in any other State or Territory."

A document thus attested and certified, is legal proof in the courts; and, if not so attested and certified is radically defective and incompetent.

The ruling of the court in admitting a worthless document as testimony in this case, against this objection, and giving to it—evidential weight on a material issue, is a disregard of the requirements of a positive law of the land.

Congress established this rule of authentication. As we shall presently see, the rule of authentication for judicial and non judicial records and writings, of every State and Territory—is the same. The custodian must attest, and the proper officer must certify that the attestation is in due form.

The error of the territorial district court cannot be atoned for or palliated by the plea, that the defendant's attorneys were lacking in vigilance or industry and have not incorporated their *reasons* for their objection, in the

record. The objection that the document is incompetent, is there; and it is a sufficient one.

There is no showing who the keeper of the articles, was; no attestation by the keeper; and no certificate by the proper officer that the attestation is in due form. A deputy city and county clerk, and a deputy secretary of state make attestations, but of what value are they?

Congress at the same time, enacted a rule relating to the manner of proving "the records and judicial proceedings of the courts of any state or territory," "in any other court within the United States," which reads as follows:

* * * * * * *

"The records and judicial proceedings of the courts of any state or territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if their be a seal, together with a certificate of the judge, chief justice or presiding magistrate that the said attestation is in due form, and the said records and judicial proceeding, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken."

(*Sec. 905 U. S. Rev. Stat.*)

"The attestation of a judgment of a state court, in order to make it evidence in another state, under the act of congress, must be signed by the clerk—the attestation of a deputy clerk is insufficient.

"Such a defect is not cured by the certificate of the presiding magistrate of the state court that the attestation is in due form. It is immaterial that the attestation conforms to the law of the state: It *must* conform to the act of congress.

"In order to make the record of a judgment evidence, it must be signed by the officer authorized by law, and

must have been filed in the proper office. Where the record itself *fails* to show these *essentials* to its validity, *it seems*, that it is inadmissible to sustain process founded thereon, even though attested in the manner required by the act of congress."

(*Morris et al. vs. Patchin, 24 New York, 394.*)

1 Greenleaf, Evidence, Sec. 506.

1 Wharton, Evidence, Sec. 118.

Attestation by an under clerk is insufficient. (*Sampson vs. Overton, 4 Bibb 409*; *Conklin's United States Practice 371.*)

The record itself should show the essentials.

If the attestation of a deputy or under clerk of court is insufficient, why not the attestation of the deputy secretary of state? or the deputy clerk of the city and county of San Francisco?

But there is no certificate to the document showing that even these attestations of deputies, *are in* DUE FORM. This is absolutely necessary, because the courts of one state or territory cannot officially know the forms of another state or territory. The act of congress directs the mode of proof. (*Smith vs. Blagge, 1 John's Cas. 249, and cases cited in note.*)

In the case of Drummond's administrators vs. Magruder & Co., 9 Cranch 124, tried in the circuit court of Virginia, a copy of a deed of assignment certified to be a true copy from the records of the Baltimore county court by the clerk of that court, was annexed to the bill as an exhibit; and the record had no other evidence of its authenticity. The court rendered a decree on this evidence in favor of the appellees. On appeal to this court the decree was reversed unanimously, and remanded for further proceedings.

The court say, in their opinion: "The answer put this

matter (the deed of assignment) directly in issue, by denying any knowledge of the deed exhibited with the bill, and requiring full proof to be made of it. This court is not at liberty to presume that any other proof of this deed was given in the court below than what appears on the record. That proof consists in the certificate of a person, who styles himself clerk of Baltimore county court; that the paper to which his certificate is annexed is a copy taken from the court of that county; but, there is no such certificate as the act of congress requires, to satisfy the court that the attestation, affixed to this copy, is in *due form*. It follows that the instrument so certified *cannot be noticed* as a deed from William B. Magrueder & Co.; and as it is the foundation of the complainant's rights, the court erred in decreeing in favor of the complaint *upon such defective evidence*."

Also see Craig vs. Brown Peters' Cir. Court Rep. 352; Shown vs. Barr, 11 Ired. 296.

In the case of Parchen vs. Peck, 2 Montana, 567, decided in the supreme court of that territory in 1877, the facts were: Parchen sued Peck in the Third District Court as the surviving partner of the Northwest Transportation Company, alleging a co-partnership. The defendant Peck, in his answer, denied the co-partnership, and alleged that the company was a corporation, formed under the laws of the state of Iowa. On trial Peck offered in evidence a copy of the articles of incorporation, attested by the county recorder and secretary of state. The laws of Iowa provide that the articles shall be recorded in both offices. There was no certificate that either attestation was in due form. The district court rejected the evidence; rendered judgment for plaintiff, and the defendant appealed to the territorial supreme court. In the decision affirming the judgment of the district court they say: "To entitle the records of these articles to be admitted in evidence in this territory, how should they be authenti-

cated? There are no statutes of this territory providing in what manner a record of this character should be authenticated for this purpose. Then the laws of the United States upon this subject. *must be complied with.* In addition to the attestation by the recorder of deeds of the county, where the corporation has its principal place of business, and the secretary of the State of Iowa, with the seal of said state, there should be to *each* attestation respectively, "a certificate of the presiding justice of the court of the county, parish or district in which such office may be kept, or of the Governor, Secretary of State, the chancellor or keeper of the great seal of the state *

* * that the said attestation is in *due form*, and by the proper officers" U. S. Rev. Sts. 906. No certificate by any of said officers is attached to the certificate or attestation of the said recorder or secretary. The Secretary of State did not add any such certificate to his own attestation. The articles of incorporation were properly rejected."

When the records of another state or territory are properly authenticated and admitted in evidence, then they are to have the same faith and credit given to them in the courts, as they have by law and usage in the courts or offices of the state from which they are taken. (*Sec. 906 U. S. Rev. Sts.*) If this copy had been a duly authenticated one, it would still be necessary to prove the faith and credit given to it in California. The record fails to show that this was done. Foreign laws must be proved like other facts, by the best proof. The court cannot be charged with a knowledge of them.

Church vs. Hubbart, 2 Cranch 187.

Talbot vs. Seeman, 1 Cranch 1.

Armstrong vs. Lear, 8 Peters 52.

Strother vs. Lucas, 6 Peters 763,

The third assignment of error is: That "THE COURT

ERRED IN ADMITTING IN EVIDENCE AGAINST DEFENDANT'S OBJECTION THE COPY OF THE ARTICLES OF INCORPORATION OF THE CALEDONIA GOLD MINING COMPANY, CERTIFIED TO BY GEORGE H. HAND, SECRETARY OF DAKOTA TERRITORY, MARKED EXHIBIT B., as the same is incompetent, irrelevant and immaterial." (Pr. record 72.)

What has been already advanced in support of the second assignment of error, is applicable to this with this further explanation.

The requirements of the act of congress cannot be evaded by filing an unauthenticated copy; and certainly a certified copy of the latter can not be received in evidence. What is not lawful to be done directly, may not be done indirectly.

The legislative assembly of Dakota has not attempted to provide any rule of authentication for the records and exemplifications of any other state or territory in the courts of this.

The Civil Code of Dakota, page 325-6, contains the following provisions relating to "Foreign Corporations:"

"ARTICLE XVII.—DUTIES OF FOREIGN CORPORATIONS."

Sec. 567. No corporation created or organized under the laws of any other state or territory, shall transact *any business* within this territory, or *acquire, hold* and dispose of property, real, personal or mixed, within this territory, until such corporation shall have filed in the office of the secretary of the territory, a *duly authenticated copy* of its articles of incorporation; and, shall have complied with the provisions of this Article: *Provided*, That the provisions of this act shall not apply to corporations or associations created for religious or charitable purposes solely.

Sec. 568. Such charter or articles of incorporation shall be recorded in a book to be kept by the secretary of this territory for that purpose.

Sec. 569. Such corporation shall appoint an agent, who shall reside at some accessible point in this territory, in the county where the principal business of said corporation shall be carried on, duly authorized to accept service of process, and upon whom service of process may be made in any action in which said corporation may be a party; and service upon such agent shall be taken and held as due service upon such corporation. A *duly authenticated copy* of the appointment of such agent shall be filed and recorded in the office of the secretary of the territory, and a certified copy thereof by the secretary shall be conclusive evidence of the appointment and authority of such agent."

The copy of the articles of incorporation filed with the Secretary, are as defective, as the copy offered and received in evidence in the district court. Only a "*duly authenticated copy*" of the articles of incorporation of a corporation created or organized under the laws of any other state or territory, is authorized to be filed in the office of the secretary of Dakota territory; and this is required before the corporation can do *any* business or acquire or hold *any* property in that territory. An inspection will show that is not the character of document required. (Pr. record 72, 73, 74.)

Unless any and every association of non residents, claiming to be a body corporate under the laws of some other state or territory, can set at naught and wholy disregard, these wise provisions of the statutes of Dakota, their observance is as obligatory on foreign corporations, as the other provisions of Chapter III of the Civil Code relating to corporations are on domestic ones. If the legislative assembly has power to prescribe rules for the

one, it has for the other, and compliance should be exacted from both. Section 567 is a prohibition as to foreign corporations doing business or acquiring property in Dakota, until they have complied with the prescribed conditions.

IN RE COMSTOCK vs. Sawyer, 9th (U. S.) Cir. Court Rep. the U. S. District Court construing a similar statute of Oregon providing that a foreign corporation before doing business in the state must duly execute a power of attorney, appointing an agent upon whom all process may be served in suits against such corporations, said:

"That such a corporation before complying with said act had no power to contract or sue in the state; and that the act was *prohibitory*, and anything done by the corporation contrary to it was illegal and void."

In this last case, the Bank of British Columbia was a creditor of the estate of C. B. Comstock & Co., bankrupts. The assignee objected to its right to prove its claims in court because it was a foreign corporation, and had not complied with the statutes of Oregon, in the particular of appointing an agent, on whom process might be served. The objection was sustained by the court; and, an imposing array of authorities—state and federal, is cited in support of its decision.

The same court subsequently, in the case of Semple vs. Bank of British Columbia (5 Sawyer U. S. C. C. Rep. 88,) held the same way. And in response to the comments of learned counsel for the defendant, who considered the decision harsh and expressed concern that such decisions would work great damage and injury to the large foreign capital represented in the state, by the various foreign corporations doing business there, the court made this straightforward answer:

'Whether there are any other foreign corporations than the defendant, that have undertaken to transact business

in this state in disregard of its legislation upon this subject, does not appear, and the court is not advised. But if there are, it furnishes no reason why this plain and wholesome statute should be refined and construed out of existence, but rather the contrary. Nor does it appear wherein consists the harshness of the ruling in question. The effect thereof may be inconvenient and even injurious to the bank, but that alone is no reason why the court should have decided otherwise, and thus refused to give effect to the *plain letter of the statute*, and the evident purpose of the enactment. A foreign corporation which engages in business in this state in deliberate defiance of the law prescribing the conditions upon which alone it may come here, must take the consequences of such illegal conduct, and has no right to complain either of the harshness of the law or its enforcement."

The supreme court of the state of Oregon in 1877, in the case of the Bank of British Columbia vs. Page, in an action to foreclose a mortgage given to secure a promissory note for $2,500, held that the statute relating to foreign corporations of that state, requiring the appointment of an attorney on whom process could be served, before transacting business therein, is an indirect prohibition against foreign corporations doing business in the state until the appointment is made.

6 Oregon, 431.

Excellent reasons are given in the decision of the court in this last case, for the wisdom of the law and the necessity of enforcing it.

The attention of this court is respectfully called to its own opinions in the case of *The Bank of Augusta vs. Earle 13 Peters 538*, where it is held that a corporation exists only in contemplation of law, and when that law ceases to operate and is no longer obligatory, the corporation can have no existence. It must dwell in the place

of its creation and cannot migrate to another sovereignty: and to the case of Paul vs. Virginia 8 Wall. 178 where it is held: that corporations are not citizens within the meaning of the clause of the constitution of the United States which declares that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states. and that foreign corporation may be restricted from carrying on its business until it has complied with the state law requiring a license to be first obtained. And where the court say: "The recognition of its existence even by other states. and the enforcement of its contracts made therein. depended purely upon the comity of those states—a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent. it follows as a matter of course. that such assent may be granted on such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities. or they may exact such security for the performance of its contracts with their citizens. as in their judgment will best promote the public interest. The whole matter rests in their discretion."

As only a duly authenticated copy of the articles of incorporation of a foreign corporation. is authorized and required to be filed with the secretary of the territory before doing any business or acquiring any property in Dakota. it follows that the copy offered and objected to in the district court. not being duly authenticated. is not evidence for any purpose. except as showing a disregard of the law; and that a document not authorized and required was filed. and a certified copy of it was sought to be made use of as legal evidence.

Besides the plaintiff was prohibited from transacting any business or acquiring any property until the required document was filed with the territorial secretary. It could not therefore, at the date of the trial, lawfully establish its ownership of the property described in the complaint, in the territorial court because of this prohibition. This objection went to the foundation of plaintiff's alleged right to recover in the action.

We pass over the fourth and fifth assignments of error as to the admission of appointment (Exhibits B. and C.,) of A. J. Rigby as statutory agent (Pr. record 74, 75, 76) merely remarking, that there is nothing on the record showing that the attestation is in due form, and by the proper officer.

To the sixth assignment of error we call the special attention of the court. It is:

"*The court erred in admitting in evidence against the defendants objection the testimony of Michael Lynch in relation to acts done in connection with the so-called Caledonia lode location on the easterly side of Shumache gulch in Lawrence County Dakota Territory, prior to the 28th day of February 1877, as the same is incompetent, immaterial and irrelevant.*"

The testimony of a large number of witnesses in relation to the June, 1876 location of the Caledonia lode, was received by the court, on behalf of plaintiff, on the trial, against defendants objection that such testimony was incompetent and illegal, on account of the fact that the Black Hills of Dakota, when the alleged Caledonia lode location was made by Michael Lynch and other, was a part of the Sioux Reservation; and so continued until February 28, 1877, when the agreement with the Sioux Nation was signed by the President. The disposition of this assigned error, in relation to Lynch's testimony, will also dispose of a majority of the assignments in this case.

When Lynch was called as a witness on behalf of the plaintiff an objection was interposed by defendant to all testimony relating to what was done in making the Calidonia Lode location in 1876 or at any time prior to the 28th of February, 1877.

The court overruled the objection, and admitted the testimony, to which ruling defendant by his counsel excepted.

(*Pr. record 78-79.*)

In support of his ruling, the judge said at the time:

"To save the point I shall permit you to object, and I will receive the testimony subject to your objection."

"I will if satisfactory to the parties, admit, subject to their objections, the evidence offered by either party of acts of location, and facts occuring prior to the 28th of February, 1877:

"First. For the reason that if the case shall go to higher courts the evidence will be all in the record, to the end that the action may be determined by such courts without the necessity of a new trial, as we do not yet know what may be the views entertained by those courts of the effect of the existence of the Indian reservation, including this property in controversy, until the February 28th, 1877 treaty."

"Second. Because I deem evidence of facts occurring prior to such date—when they relate to, and are *properly* connected with, and tend to establish the existence of facts on and after February 28th, 1877, *essential* to a valid mining claim—material and relevant."

(*Pr. record 78-79.*)

The district court should not have admitted proof of admittedly illegal, prohibited acts, as the inception of property rights, to go in, to swell and encumber the record on the possibility or hypothesis that if the case should go to higher courts, the evidence competent and incompetent.

relevant and irrelevant—would all be in the record, to the end, that the action might be determined by such courts, without the necessity of a new trial.

Is it possible that such is the office of a territorial district court, to let in and listen to incompetent and unlawful testimony, hold it to be "essential to a valid mining claim—material and relevant," consider it, and make it the basis of findings of fact and conclusions of law on which to found a judgment? or to receive it and make it a part of the record so that higher courts might determine it on such drag-net testimony as was let in, in this case? Since when has this practice obtained in the courts?

In excuse for this remarkable ruling, the court pleads ignorance of the law. Listen:

"We do not yet *know* what may be the views entertained by those (higher) courts of the effect of the existence of the Indian Reservation, including this property in controversy, until February 28th, 1877."

(*Pr. record* 78-9.)

Perhaps the judicial reasons, for other rulings excepted to, on the admission of evidence, and brought here for review, are equally cogent. Think of it! The court did not know what might be the view entertained by the higher courts, upon a simple rule of evidence; and, because of its want of knowledge in that regard, it rushes in an avalanche of admittedly illegal and incompetent testimony into the case, to be judicially considered, because it holds it to be essential and material and relevant to a valid mining claim. This in July, 1880.

A district of country had been selected in 1868 to be the permanent home of the Indians, by a commission, appointed by ther Pesident and Senate in pursuance of the treaty with the different tribes of Sioux Indians.

This district was originally bounded on the south by

the north line of the State of Nebraska; on the west by the boundary line between Dakota and Wyoming Territories; on the north by the 46th parallel of north latitude, and on the east by the Missouri river. The treaty between the United States and the Sioux Indians was concluded April 29th, 1868; was ratified by the Senate February 16th, and proclaimed by the President February 24th, 1869. In it are the following provisions in Article 2:

"And the United States now solemnly agrees that no person except those designated and authorized so to do, and except such officers, agents and employees of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, *shall ever be permitted to pass over, settle upon, or reside* in the Territory described in this Article, or in such territory as may be added to this reservation for the use of the Indians, and henceforth they will, and do hereby relinquish all claim or right in and to any portion of the United States or Territories, except such as is embraced within the limits aforesaid, and except as herein provided."

By an agreement made subsequently, with the Indians, ratified by Congress and approved by the President February 28th, 1877, the region of country known as the Black Hills of Dakota, and which was a part of the district selected, was relinquished by the Indians to the United States, and thus its mineral lands were first *legally* opened to exploration, occupation and settlement under the mining acts

In the early part of 1877, the "higher" court of this Territory—the Supreme Court—of which the learned district judge who tried this case was a member as early as 1878, held that a homicide, committed in Deadwood in the Black Hills, on the Reservation, in 1876, was properly tried on the Federal side of the District Court.

McCall vs. United States, 1 Dakota 334.

In *Uhlig vs. Garrison, 2 Dakota 71*, decided at the December Term, 1878, the Supreme Court of the Territory in an action to recover on a lease made in Deadwood August 24th, 1876, brought to that court on appeal, held as follows:

"The contract in this case was made at Deadwood, and was to be performed there. But at its date, that place was and had been, set apart, for the absolute and undisturbed use and occupation of the Indians. As it was unlawful for the contracting parties to settle upon the lot in controversy in August, 1876, so it was unlawful for them to assume the relation of landlord and tenant in regard to it. The object of the contract was unlawful when the contract was made. The object was to induce the lessee to take possession of, and to occupy the town lot, and to erect a building for a store and to get rent for the ground. This written contract, having such unlawful object, was and is entirely void.

"When the United States solemnly agreed that such persons as made this writing should not be permitted to settle upon this lot as long as the treaty stipulations should exist, it amounted to a prohibition. The treaty was the supreme law to warn and deter them from such unlawful contract.

"The object of the contract was, moreover, in violation of section 2118 of the Revised Statutes, which declare that "every person who makes a settlement on any lands belonging, secured or granted by treaty with the United States to any Indian tribe, or surveys or attempts to survey such land or to designate any of the boundaries by marking trees, or otherwise, is liable to a penalty of one thousand dollars. The President may, moreover, take such measures and employ such military force as he may judge necessary to remove any such person from the lands."

"The contract was not only void but the parties were, therefore, liable to a prosecution for the penalties. But aside from the latter consideration, such a contract cannot be sustained either at law or in equity. For as was said by Chief Justice Taney, in Kennett vs. Chambers (14 How. 50.) "as the sovereignty resides in the people, every citizen is a portion of it, and is himself personally bound by the laws which the representatives of the sovereignty may pass, *or the treaties* into which they may enter, within the scope of their delegated authority. And when that authority has plighted its faith to another nation, that there shall be peace and friendship between the citizens of the two countries, every citizen of the United States is equally and personally pledged. The compact is made by the department of the government upon which he himself has agreed to confer the power. It is his own personal compact as a portion of the sovereignty in whose behalf it is made. And he can do no act, nor enter into any agreement to promote or encourage revolt or hostilities against the territories of a country with which our government is *pledged by treaty* to be at peace, without a breach of his duty as a citizen, and the breach of the faith pledged to a foreign nation. And if he does so, *he cannot claim the aid of a court of justice to enforce it.*

"This admirable exposition of the law arose in a case affecting a treaty with Mexico, and the same principle must govern in our courts in regard to a treaty with an Indian Nation. The latter is as much the supreme law as the former. If our government solemnly pledges its faith by treaty, with Indian tribes, it must ever be held to be as sacred and binding as if it were plighted to civilized nations. To maintain treaties, especially with the weak, is the glory of a nation, because it redounds to its honor and prosperity. To break them is to violate all law, and all faith and all honor. Carthage has come down to us through the long line of the centuries, as a

people characterized by "Punic faith."

"A contract is unlawful which is contrary to an express provision of law, or contrary to the policy of express law, though not expressly prohibited or otherwise contrary to good morals. (See *Armstrong v. Toles*, 11 Wheat 272; *Kennett v. Chambers*, *supra*.) And the law will not aid either of two parties who are equally in the wrong.

"This case very much resembles that of *Dupas v. Wassell*, (1 Dillon's C. C. R., 213.)

"In which it was held that the lease was void by reason of being in violation of the Act of Congress reserving the Hot Springs lands, and because the lease was against public policy, and the lessee was not estopped to deny his landlord's title.

"From all the above considerations must be drawn:

1. That the place in which the land in dispute lies, being also the place of the contract and of its performance, was Indian Country, to which the Indian title was not relinquished until by force of the agreement, approved February 28th, 1877.

2. That the *locus in quo* also became an Indian reservation by virtue of the aforesaid treaty, ratified by the Senate on the 16th of February, 1869, and proclaimed eight days afterwards by the President, and that it continued to be so reserved until the cessation of the title under the aforesaid. agreement, approved in 1877.

3. That the relation of landlord and tenant, as to this lot of ground, could not, legally exist on the said 24th of August, 1876, or afterward, whilst the treaty was in force or the land remained as Indian Country.

4. That the said contract of lease, being at its date unlawful in its objects and in violation of the treaty and of the Statute, and contrary to public policy was and is entirely void.

5. And that, as the plaintiff's present action altogether rests upon this alleged contract, the action must fail.

6. That consequently the District Court erred, in refusing to charge the jury in accordance with the defendant's request, that the plaintiff could not make any lawful lease of the ground in controversy.

"No question touching at all upon the provisions of section 2318, of the Revised Statues of the United States, has been presented in this case, and therefore, nothing in this opinion is to be construed as relating to such mineral lands.

"The District Court having erred in refusing to charge the jury as stated, it follows that the judgment must be reversed and the cause is remanded to the court below, with directions to dismiss the action and it is so ordered."

In the case of *French et al. vs. Lancaster et al.*, tried in the same district court, counsel on both sides stipulated that the action might be tried the same as if no Indian Reservation had existed. It was an action to recover the possession of a mining claim and for damages. There was a verdict and judgment in favor of plaintiffs for the possession of the mining ground in controversy, and for $15,706.00 damages. On appeal to the Territorial Supreme Court, notwithstanding the stipulation of the parties to the record, appellants questioned the validity of the location of plaintiff's mining claim, (Chief of the Hills lode) because it was located in 1876,—although a new location was proven to have been made March 15th, 1877, by the plaintiffs. The record showed the evidence of a pretended location of plaintiff's claim in June 1876, and of alleged continued possession, work &c., &c., and relocation—including the aforesaid stipulation of the parties. The Supreme Court held that it was bound to take judicial notice of the invalidity of the location, the

evidence and the stipulation on the record bringing the same to their notice.

In the "Memorandum" made in lieu of a formal written opinion, the court said:

"No opinion has been written in the case, Judge Barnes to whom it was assigned, having gone out of office before the opinion was prepared. In the decision the *same principle* was applied to the mineral lands in controversy, situated in the Black Hills, as was decided with reference to real property in the case of *Uhlig vs. Garrison, ante.*"

"The court held that no title to mining ground could there be acquired by acts of location or appropriation, done prior to February 28th, 1877, and while the great Sioux Reservation covered that district of country. That this action having been tried to a jury and a general verdict rendered, without regard to the existence of said reservation, and upon the theory that such reservation did not *affect* the question between these parties, it was a mistrial, notwithstanding, the parties had stipulated to try the action, public policy requiring the court to take notice of the facts, even though parties might stipulate to the contrary." (*2* Dakota Rep. 346.)

In the case of the *Golden Terra Mining Company vs. Levi S. Smith et al.*, (2 Dakota 462,) the Supreme Court of Dakota say;

"The action was tried (in the district court) before the decision of this Court in the case of *French et al. vs. Lancaster et al.*—not yet reported, in which it was held that no title could be acquired to mining ground situated upon the Sioux Reservation, by any acts of location performed while such Reservation existed, and, that such Reservation included all of the Black Hills in this Territory, and existed until February 28th, 1877.

"To that decision we adhere. By two other decisions

—one in *McCall vs. United States*, and the other, *Uhlig vs. Garrison*, we have held the Reservation included the Black Hills country, and in the last above named, that no title could be held or transferred by or between parties, being thereon, in violation of the treaty under which said Reservation was created.

* * * * * * * * *

"We do no not intend to detract in any degree from the effect of our decision concerning the invalidity of attempted acts of location of a mining claim upon the Sioux Reservation, done prior to the date spoken of—February 28th, 1877; and we decline to consider the question of estoppel, or any other question founded upon *declarations* or *acts* which can neither create a right or be the means of transferring one."

The court was not at such a disadvantage for want of knowledge as to the probable viaws of the higher courts, as might be inferred from the reasons advanced. Be this as it may, the case was tried by the court on the same theory on which the plaintiff's pleadings were drawn, viz: that the location of the Caledonia lode in June, 1876, was valid.

In his conclusions of law number II, the judge found that it was "regular and valid, except as it was affected by being situated upon the Sioux Indian Reservation," but what effect this exception had on this otherwise "regular and valid" mining location, he did or he did not know. If he did know his findings and conclusions are erroneous; and if he did not know the same result followed.

It is safe to say that nine-tenths of all the plaintiff's testimony which was received against the defendant's objections, related to acts done and declarations made on the Reservation prior to 28th of February, 1877.

Lynch and his co-locators illegally entered upon, ille-

gally passed over a part of the Indian reservation, illegally settled thereon, illegally discovered and illegally marked the boundaries of this alleged mining claim, to-wit: the Caledonia lode; illegally recorded and worked upon the same; and that illegality still attached to each and all of these acts; and the subsequent agreement between Congress and the Indians which eliminated the Black Hills from the Reservation, did not remove this illegal taint from them.

The same objection taken to Lynch's testimony, was renewed to all similar testimony of witnesses for the plaintiff, and to documents about miners' meetings, and to rules adopted at them, and to mining records kept in the so-called Whitewood Quartz Mining District, prior to the date of the ratification by Congress of the Sioux Agreement. They were all overruled by the court, as far as made, and the testimony received. The Supreme Court of Dakota sustained these rulings in this case, despite its decisions in former ones.

Very strange is the second ground given by the trial court for the admission of this incompetent evidence. How evidence of facts (admitedly illegal) occurring prior to February 28th, 1877, can be properly connected and relate to a valid quartz mining location made after that date, is somewhat enigmatical. Properly connected! The condition and the reason make a rope of sand. Again: Holding that the admission of such evidence when properly connected with, and tending to establish the existence of facts *on* and *after* February 28th, 1877, is essential to a valid mining claim—material and relevant, seems to us to be grossly erroneous. That a valid mining location on and after that date needs any connection whatever with acts done prior thereto, carries its own refutation in the statement of the proposition.

It does not dispose of the objection to this testimony, to say that it was harmless and could not prejudice the de-

fendant. It certainly impressed the court, and influenced the judge to make certain findings of fact and conclusions of law in regard to the defendant's rights, and in regard to the pretended Caledonia lode location, which are unequivocally prejudicial; and shows how the judicial mind in this instance, was warped away from the line of impartiality and legal duty, by incompetent and illegal testimony.

What the law relating to the location of mining claims upon mineral lands does not permit to be done, *must*, so far as being the inception of a mining right under it, be considered as though it had never been done. Such was the reasoning of this court, in a case of an attempted relocation of a mining claim in Montana, before actual forfeiture had occurred.

"The right of location upon the mineral lands of the United States, is a *privilege* granted by congress, but it can only be exercised within the limits prescribed by the grant. A location can only be made where the law *allows* it to be done: Any attempt to go beyond that will be of no avail." (*Belk vs. Meagher, 104 U. S. 284.*)

Did the attempted Caledonia lode location in 1876 become operative on February 28th or March 1st, 1877, so as to give Lynch, Lackey and others the exclusive right to the possession and enjoyment of the claim after that? A similar question was asked by this court in the case last cited, and it answered the same as follows:

"We think it did not. The right to the possession comes only from a *valid* location. Consequently if there is no location there can be no possession *under* it. Location does not necessarily follow from possession, but possession from location. A location is *not* made by taking possession alone, but by working on the ground, and doing whatever else is required for that purpose by the acts of congress, and the local laws and regulations. As in this case, all these things were done, when the law did

not allow it; they are as if they had never been done." (*Belk vs. Meagher, Ib. 284.*)

Apply this doctrine to the present case and the discovery, development, posting and recording of a location notice, and the marking the boundaries of the Caledonia claim with stakes and blazed trees and stumps, vanish into airy nothingness; and there was nothing in the character of a Caledonia claim and location existing that could be amended and supplemented, as is alleged to have been done in this case about March 15, 1877.

We append to and make a part of this Brief Chapter 31 of the Codes of Dakota, 1877, relating to "Mines and Mining." Taken in connection with the mining acts of congress it shows what steps were required to be taken in Dakota in 1877-8, by the discoverer of a vein or lode of quartz or other rock in place bearing valuable mineral, upon the public lands of the United States, in order to make a valid mining location, and acquire possessory rights therein.

Section 13 of these local laws and regulations allows "the locator of any mining claim" when he apprehends that his original certificate was defective, erroneous or that the requirements of the law had not been complied with before filing, &c., to file an *additional* certificate, to cover the defect or error. This only relates to defects or errors of form. If the original is radically and substantially defective—as where it does not comply with the requirements of Section 4, it is void. But this remedial provision only relates to the paper called the location certificate, required to be recorded with the Register of Deeds. There are no provisions providing for amending or supplementing a defective mining location, much less an illegal and void one. Relocations are permissible upon abandoned mining ground, in the manner provided in Section 16, of said local law.

We submit there are no allegations in the amended and substituted complaint of a location or relocation of the pretended Caledonia lode, after it was lawful to make one in the locality named. The plaintiffs pleading is an information, prepared by its own counsel, charging upon its predecessors and grantors in interest, grave acts of turpitude, which it alleges have vested in it certain property rights.

What has been said in reference to Lynch's testimony will apply to assignments No. 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 27, 29, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 65, 67 and 68; and to Findings of fact numbered III, IV, V, VI, VII, VIII, IX, X, XI and XII, and to conclusions of law respectively, numbered II, III, V, VII, VII, VIII, all relating to acts done and declarations made prior to February 28th 1877, in relation to an unlawful attempt to locate the said Caledonia lode.

Assignments 24, 25 and 26 can be rapidly disposed of if either one of the previous assignments of error are well taken and sustained.

On the part of plaintiff a deed of release and quit claim from Henry Lackey, Peter O'Neill, Robert Curlin, John M. Murphy, Michael Heffron, Louis P. Elliott and John Morrow—the former plaintiffs in this action, to Thomas Bell was offered in evidence. The deed purports to convey to Bell "the Caledonia lode or mine, said mining claim having been located and recorded in the name of James Manning, Robert Curlin, Michael Lynch and Michael Heffron in the month of June 1876."

(*Pr. record 149.*)

This is the language of description of the property, sold and conveyed in the deed: and its location is described in the instrument, "as situated on the east side of

Shoemaker gulch, in the Whitewood Quartz Mining District, Lawrence County, Territory of Dakota."

As if to remove all doubt of its identity the mining claim is described as the one located in June 1876, by Lynch, Heffron, Curlin, and Manning. The document was objected to as incompetent, immaterial and irrelevant. (*Pr. record 110.*) There is no warranty, and the grantee only gets such title in the property described, as the grantors had at the time of the sale and conveyance.

We suggest for reasons already stated that the grantees had nothing to convey, and conveyed nothing to Bell by this deed.

The plaintiff next offered in evidence a similar deed from Bell to the Caledonia Mining Company, of date September 17, 1878, and purporting to have been executed on that day. The same mythical mining claim, described in the deed, to Thomas Bell, is attempted to be conveyed to the plaintiff by said Bell: (*Pr. record 112*) although at the date of this conveyance the copy of the Articles of Incorporation of the plaintiff, which was objected to early on the trial of the case, had not been filed in the office of the Secretary of the Territory, and the prohibition in its laws against Foreign corporations acquiring property was in full force.

(*Pr. record 74.*)

To bridge this apparent difficulty, another similar deed, from Bell to the plaintiff, dated Dec. 10th 1878, and purporting to convey the same property to the plaintiff was offered and received in evidence.

(*Pr. record 113-114.*)

If the first conveyed title the second one was immaterial. The deeds were executed in California.

There is no mention of any location or relocation of the Caledonia Mining Claim in any of these deeds, at a time when it was possible and lawful to have made one recited as the subject intended to be conveyed.

What we have said about the theory upon which this action was brought and prosecuted by the plaintiff, and *tried* by the court, abundantly appears. The theory is that the alleged location of the Caledonia in June, 1876, was a valid one, or could be made a valid one by connecting it with facts occuring after February 28th, 1877. In other words that pretended acts of location illegal and criminal in themselves, could be transformed into legal and valid acts by the wrong doers. "No man shall be permitted to take advantage of his own wrong" used to be a maxim of the law.

"Every pleading must proceed upon some simple definite theory, which must be determined by its general scope and character. To this theory, so determined, the party must be held through all the stages of the case, and upon it he must stand or fall."

(Mescall vs. Tully, 91 Indiana 96.

W. U. Tel. Co. vs. Reed, 96 Indiana 195-8.

First National Bank vs. Root, 8 N. E. Reporter 107.)

The theory of the June, 1876 location as the source of plaintiff's ownership, is manifest from the complaint, and the plaintiff must be held to it: ownership is not claimed from any other source.

The attention of this court is specially invited by defendants to assignments numbered 34 and 35, in connection with a pretended location or relocation (it is not clear which) of the Caledonia lode location by the former plaintiffs, Lackey and others, March 2d, 1878, the certificate of which was offered and received in evidence against objection.

No location of this claim after February 28th, 1877, is alleged in the complaint, nor is any relocation of it alleged.

A surveyor, one W. L. Smith, was called by the plaintiff as a witness, who testified that he had surveyed the Caledonia in November, 1877. He said he was shown where to run the lines by Lynch, Heffron and one or two

others of the '76 locators who claim to have originally staked the Caledonia. Now the uncertain will be made certain. He prepared field notes of that survey, giving the starting point as the south-east corner of the claim, and he connected that point with certain prominent and permanent monuments, recited in his notes, so that his "starting point" can with almost absolute certainty be determined. From this his courses and distances are run defining the so-called Caledonia lode by its metes and bounds, and he ties three of its corners to other prominent monuments. The *locus in quo* of this mining claim ought to be ascertainable. True, he says, that he did not find any stake, stump or monument on the lines, shown to him to survey by the original locators, marking the claim, except the black stump at the south end, which, by the way, was not an original boundary stake, but stood twenty feet or more outside of the claim: so at least Lynch testified. (*Pr. record 129-130, as to certificate, and Smith; and Pr. record 77-78-132 as to his testimony regarding finding no stakes or monuments;* and Pr. record 81-132 as to black stump at south end being 20 or 30 feet away from the claim.)

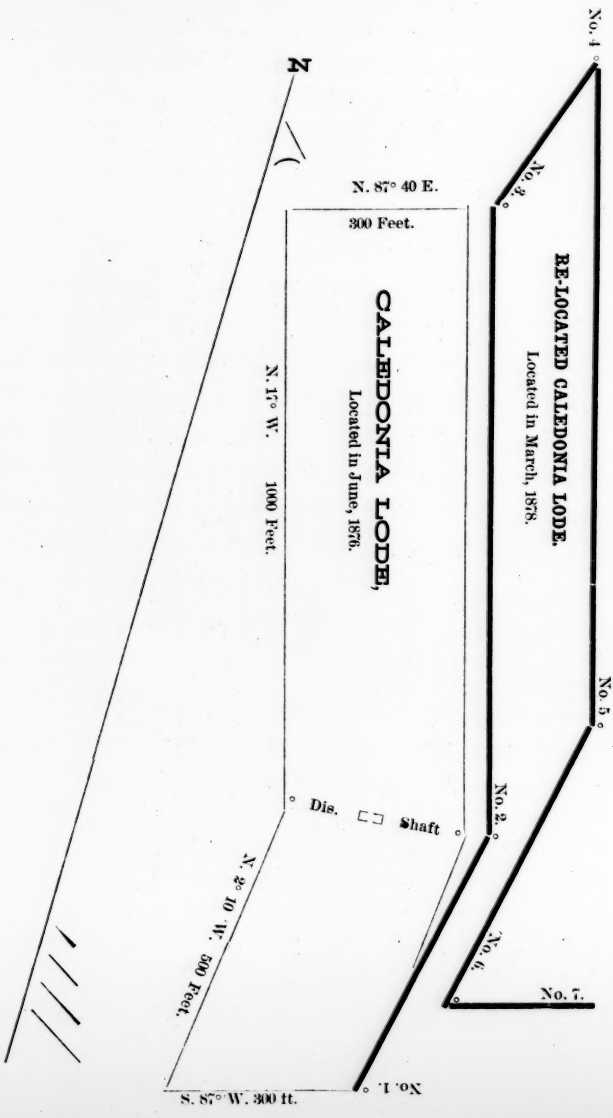
On being handed the certificate of March 2d, 1878, for the purpose no doubt, of establishing the accuracy of the notes recited in, and made a part of the certificate, he said there was a mistake in it, but did not point out very clearly what it was. (*Pr. record 130.*) But the plaintiff, though warned, paid no heed to the real or supposed mistake, but offered the certificate as it was, in evidence, which was received over the defendant's objection. This was all the evidence offered of a location or relocation of the Caledonia in 1877 or 1878.

Perhaps it will be contended that this is the location sold and conveyed to Bell, and by Bell to the plaintiff, instead of the June 1876 location. The written declaration in this certificate as to the *locus* of the claims, its metes and bounds, binds this plaintiff; and the court makes a

finding of fact in relation to the same, which does not warant the judgment rendered.

"Finding of fact XIV. (Pr. record 36-37.)

The following diagram shows



the Caledonia lode as mapped by Surveyor Smith, with the discovery shaft indicated, its surface boundaries marked by posts and monuments as located and claimed in 1876; and the Caledonia lode as claimed in the re-location certificate of March 2, 1878 and as found by the Judge in finding of fact XIV. The latter has no discovery so far as known, and does not include the ground sued for in this action. It lies east and north of it.

Relocation implies an abandonment or forfeiture of mining ground that had been previously located. Something more than recording a certificate is required to make a relocation. There must be a new discovery shaft or a sinking of the old one, a marking of the boundaries anew or the adoption of the old posts and monuments, the erection of a new discovery stake and notice, and none of these things appear to have been done.

It is submitted that the specific description given in the re-location certificate, and found as a fact by the Judge, describes no mining claim at all. The six lines mentioned inclose no area; and if the court could make the last one close by any latitudinarian construction with the place of beginning, it would include no part of the ground in dispute.

Bell's purchase was the invalid location of 1876, or the pretended re-located Caledonia of March 1878. In either case he got nothing, and consequently, conveyed nothing to plaintiff.

There is no allegation in the complaint to which this testimony of Smith and this certificate, are in any manner responsive.

All the findings of fact in relation to the Caledonia lode claim were, by the court, found in favor of the plaintiff; and all, or nearly all, were excepted to by the defendants, and made grounds for the motion for a new trial.

At the risk of being considered tedious, these findings

excepted to, and which are assigned as error, we will briefly review because we contend,

First: That the court failed to find on all the material issues in the action; and

Second, That the issues found do not support the judgment.

The complaint alleges clearly (3d allegation) that Lynch, Heffron, Curlin and Manning, citizens &c., in the month of June 1876 went upon the public domain of the United States, discovered a well defined vein or lode of rock in place containing valuable deposits of gold, and thereafter to-wit; on the 21st day of June, 1876, "located and appropriated in accordance with the laws of the United States and the Territory of Dakota, and the rules, customs and regulations of the miners of the Whitewood Quartz Mining District (within which said claim was situated) a quartz lode mining claim, including within its limits the vein or lode discovered by them as aforesaid, and being fifteen hundred feet in length along said vein or lode," "and three hundred feet in width," and named the same as the California lode.

This allegation is squarely put in issue by the denial in the answer. The fact of the location of a quartz mining claim at or about the time and place alleged, is the one to which the court should respond affirmatively or negatively. It is the main issuable fact, and the defendant was and is entitled to have this determined squarely. A legal location is averred, and denied, of the Caledonia lode. What says the court in its finding on this issue? It merely found that the alleged locators did certain acts at the time and place stated, from which a location of a mining claim at the time and place, could not be inferred. The ultimate fact in issue was not passed upon, nor found by the court; but certain probatory facts are found which

are usual in making locations of mining claims. (*Finding IV.*)

Again: It is alleged that the persons named as locators of the Caledonia lode, and some others named in the same paragraph of the complaint. "while owners and in possession of the same" on or about March 15th, 1877, made an additional and supplementary claim and location of said Caledonia claim. The answer puts this in issue directly; and defendant was and is entitled to a direct finding upon it. If a negative finding was returned the defendant would prevail, and if an affirmative one, the defendant could properly inquire, what "an additional and supplementary claim and location was" about the date named, and how the same was effected, under the law. Mere recitals of words, terms, or phrases is not finding upon a disputed issue, but is a practical evasion.

SYNOPSIS OF FINDINGS FOR PLAINTIFF.

Finding I. That the Caledonia Gold Mining Company is, and has been a corporation under the laws of California since September, 1878. (Pr. record 27.)

COMMENT:—The court is no more at liberty in this case than it was in the case of Drummond vs. Magruder, cited before, to "presume that any other proof" of the incorporation of plaintiff, "was given in the court below, than what appears on the record." The existence of a Foreign corporation is a fact, which must be proven. (*Angel and Ames on Corporations, Sec. 633; Bank of Utica vs. Smalley, 2 Cowen, and cases cited; Stoddard vs. Onondaga 12, Barb. 575; Waterville vs. Bryan 14 Barb. 183; Kennedy vs- Cotton, 28 Barb. 63; Phoenix Bank vs. Donnell, 41 Barb. 574; Gilbert vs. Manchester, 11 Wend. 629; Slatt vs. Catskill Bank; 18 do. 474; Trustees Vernon Society vs. Hill, 6 Cowen, 23.*)

If we are not entirely mistaken in our view of the offered proof, this finding is without any support.

Finding II. That the ground or premises in dispute is in the Whitewood Quartz Mining District, Lawrence county, Dakota Territory. (*Pr. record 27.*)

COMMENT:—This was not objected to; but was so stated in the answer.

Finding III. That in December, 1876, the miners in Lost Mining District held a meeting and adopted certain mining rules and regulation, a copy of which is set out in an exhibit as a part of the finding. (*Pr. record 27, 28, 29, 30, 31.*

COMMENT:—In effect this is finding that the miners in that district at that time, who were there in violation of the stipulations of the second article of the Treaty of 1869 with the Sioux tribes of Indians, could enact and adopt rules and regulations for the miners of the district superior to, and more effective than a solemn treaty by the Government. Nor could the meeting of miners on March 6th, 1877, breathe legality and validity into those rules and regulations, by their attempt to "re-enact and legalize" them, by making reference to them as if they were legal facts. Similar rules and regulations might have been adopted at this meeting, but were not. This finding, we contend, was erroneous.

Finding IV.—That the Caledonia lode was discovered and certain acts of location were made by Lynch, Heffron, Curlin and Manning in June, 1876, in the locality named. (*Pr. record 31.*)

COMMENT:—This is finding an illegal attempt to make a mining location in defiance of the supreme law of the land.

Finding V.—That Heffron, Lynch, Curlin and Manning continued their trespass, and their illegal acts from

June, 1876, down to February 15th, 1877. (*Pr, record 32–33.*)

COMMENT:—This is quite as bad as any previous one, on which to base a mining right.

Finding VI.—That the proofs and evidences of their attempted location, that is; "all of the posts and monuments marking the surface boundaries of the said Caledonia claim which had been placed there by the locators in June, 1876, remained and were standing in the same places as originally placed," on the 28th of February and 1st of March, 1877, and that said locators were the owners and in possession of said illegally located mining claim on those dates. (*Pr. record 33.*)

COMMENT:—The facts last above found were criminal acts, subjecting the perpetrators to a penalty of one thousand dollars. (*Sec. 2118 U. S, Rev. Stat.,*) and the court makes these criminal acts evidences of *ownership* and *possession* of a mining claim, the moment the Black Hills were eliminated from the Indian Reservation by the subsequent agreement with the Indians, approved by the President February 28th, 1877. This court will hardly sanction and confirm such wanton findings.

Finding VII.—That from February 28th until March 15th, 1877, Lynch, Heffron, Curlin and Manning, the so-called locators of the Caledonia lode, and Lackey, O'Neill, Murphy and Elliott were the owners of said mining claim. (*Pr. record 33.*).

COMMENT:—The finding, like those preceding it, is on the assumption that the illegal and in part criminal acts of the original locators, vested some right of ownership in these parties between those dates. No acts of location have been found, as having been performed between those dates. Something was required to be done in order to

clothe these parties with the ownership, or the right of possession to the ground in dispute.

"Owner" is understood to mean the rightful possessor or proprietor of a thing. How was this alleged ownership established? Four of these men are the alleged locators of an invalid mining claim. There is no finding of fact how the last named four also, became owners; yet this is a fact necessary to be found separately; there is no finding that any of them, at any time on the 28th of February, 1877, or at any time thereafter and prior to March 15th, 1877 acquired, by any lawful acts, the ownership, or a right to the possession of what is called "the said Caledonia claim." All the evidence is brought on the record in this case, and we ask to be cited to one single act of location or proof of ownership between those dates to that claim.

Finding VIII.—That on February 28th and March 1st, 1877, the said owners of the Caledonia claim were in the actual and exclusive possession of the same running drifts from the Discovery shaft and stopeing out ore, and had been so continuously at work from February 15th until April 1st, 1877.

(*Pr. record 33-34.*)

COMMENT;—It is clear from the last finding that the ownership and possession found and relied upon must be referred to a period anterior to February 15th, 1877, as the development work described, as being carried on at the earlier date, "running drifts from the Discovery shaft" must be referred to a Discovery shaft existing at that date.

The theory of the court on which this case was heard, tried and determined, is: that all the illegal, unlawful and unwarranted acts of Lynch, Heffron, Curlin and Manning, in attempting to make a mining location on the Indian Reservation, were transformed into legal ones by the Pres-

ident's approval of the agreement with the Sioux, February 28th, 1877. In other words that their acts were validated by the relinquishment of the Black Hills by the Indians. And that being continuously at work running drifts and stopeing ore, between the dates named, that the discovery shaft and boundary monuments of June, 1876, became by some mysterious *hocus pocus* operation, a valid discovery shaft and a valid marking of the boundaries of the so-called Caledonia claim. Being *continuously at work*, running drifts and stopeing ore, as the court has found, from February 15th until April 1st, 1877, they could not well have been engaged in anything else between those dates; and the finding precludes the idea that any new discovery shaft was sunk, or that the old one was carried down ten feet deeper, or that any new discovery stake was erected, or that there was any new marking of the boundaries of the Caledonia claim, after the President's approval of the Indian relinquishment took effect, between the dates named.

Finding IX. That on February 28th, and March 1st, 1877, the owners (?) of the said Caledonia claim adopted the posts and monuments then standing, marking the boundaries of said claim, the discovery of the vein, the Discovery shaft and other work done, and claimed title to said claim as thus marked and defined, and discovered, and *according* to the *original* notice of location.

(*Pr. record 34.*)

COMMENT:—This like the other findings unmistakably, proceeds on the theory that the *original* location was validated. The title is claimed according to the original location, not by virtue of a new one made on or after February 28th, 1877. There is no attempt at distinguishing between the alleged ownership of that day as attaching after the President's approval of the Sioux agreement and that claimed as existing before; but all claim of title, ownership, right of possession, and

so forth, is referred to, and take their inception from the original (June. 1876) location. Upon its validity the claim of title, ownership and right of possession of the plaintiff is based.

If defendant's contention is correct, the claim of title, ownership and right of possession of the original plaintiffs on February 28th and March 1st, 1877, are invalid and void. If the claim is made by reason of what was done upon and after those dates, what was done that title, ownership or right of possession to the so-called Caledonia claim in the former plaintiffs attached? Was it by a new location under the mining laws? What were the acts of location? Not one of them found! No discovery made; no discovery shaft sunk; no discovery stake erected; no location notice posted; no marking anew of the boundaries of the location. But the court finds that the owners on February 28th and March 1st, 1877 "adopted the said posts and monuments then standing as above mentioned, and marking the boundaries of said claim, and the Discovery of the vein or lode thereon made, and the Discovery and the other work done thereon, and *then* and *thereafter*, claimed title to said claim as thus marked and defined by said posts and monuments, and to said lode thus discovered: and *under*, and *according to the original notice or certificate of said location* then standing on the records of Whitewood Quartz Mining District." But if, at the moment, they were the owners of the claim, why claim title *then* and *thereafter*, when they were the owners before? How was the feat of *adoption* of posts and monuments, discovery of the vein or lode, the Discovery and other work, accomplished? Was it by intention or by act, or by both? And if by act what was done, pray, that changed these illegal acts, these proofs of an unlawful intrusion upon prohibited lands, into lawful evidence of ownership of a mining claim, on the instant that the prohibition ceased.

Whether a new discovery of the vein or lode was necessary after the mineral lands of the Black Hills were opened to the explorer for valuable minerals, we need not stop to inquire; but all other acts of location of a mining claim had to be original with the locator. In case of re-location the acts of location must be original with the re-locator as they were with the locator. (*Wade's American Mining Law, p. 57; also Sec. 16, Chap. 31, Laws of Dakota.*)

There are two methods in Dakota by which title to mineral lands that are open to exploration, and occupation can be acquired. One of these is: by making a discovery of the vein or lode of quartz or other rock in place bearing some valuable mineral, and then within a reasonable time afterwards sinking a discovery shaft ten feet, erecting a discovery stake at the point of discovery, posting a location notice thereon, marking the boundaries of the claim and recording a certificate of location. The other way is by re-location of an abandoned claim which probably does not require a new discovery, but the re-locator must sink a new discovery shaft, or sink the old one ten feet deeper. This is how the old discovery must be adopted.

In either case, a new discovery stake must be erected, and a new, or re-location notice must be posted. In *any* case the location certificate *must* state that the whole or some part of the new location is located as abandoned property. (§*16 Chap. 31 Laws of Dakota, 1877.*) But the Caledonia lode was never lawfully located, and was never re-located for that matter. The Indians alone "had the right of possession" of the country under the treaty stipulations, and whatever was done by the so-called owners of the Caledonia prior to February 28th, 1877, must be considered as if never done.

Finding X.—That on the 15th day of March, 1877, the then owners(?) of the said Caledonia lode, with a discovery and the boundaries marked "as above mention-

ed" made and filed for record, "a certificate of location of said claim, made and recorded by the locators in June, 1876," and a supplementary notice or certificate of said Caledonia mining claim.

(*Pr. record 34.*)

COMMENT:—This is only another form of stating what had already been found several times by the court, with the additional announcement that a "supplementary notice or location certificate," as well as a copy of the old one, was filed for record. An "additional certificate" of location is authorized to be made and filed, for certain purposes, by the local laws of Dakota. (Sec. 13, chap. 31, relating to *Mines* and *Mining*); but we cannot say what the contents of a supplementary location certificate should be, or what its office is, or what effect is to be given to such a document as it is unknown to the mining laws of Congress and of the Territory. The original of June 21st, 1876 is not sought to be corrected, even were that a possible thing, nor is the lack of description in it sought to be cured. Neither is it treated as worthless and abandoned, but as the principal thing, to be aided and bettered somehow, by the supplementary one. The supplementary certificate or record is stated to be added to the original "to show present *ownership* and cover any *illegality* that might attach to making mining locations upon the Indian Reservation." In substance it is like an original location notice, and contains more of the statutory requirements than the original, to which it is declared to be an addition. No independent discovery shaft, no sinking of the old one ten feet, no erection of a new discovery stake, and no marking of the boundaries of the Caledonia claim at or about this time is found by the judicial findings of facts. Hence there was no location made under the law. The locators carefully adhered to their theory that the attempted location of June, 1876 was a valid one. By it the plaintiff must stand or fall.

Finding XI.—That the *owners* posted on a tree about four feet from the discovery shaft a copy of said original and supplementary notices of location, having filed copies for record in the mining recorder's office the day previous.

(*Pr. record 35.*)

COMMENT:—This was reversing the usual order in such matters: posting and recording. Unaccompanied with the acts of location that usually precede, but which must necessarily accompany the posting of notice and record, no legal right to a mining claim followed, from mere record and posting.

Finding XII:—That the said *owners* of the Caledonia lode, filed for record in the office of the Register of Deeds office, April 25th, 1877, a copy of the original and supplementary location notices spoken of, except that in the last supplement there was a mistake made in the number of feet allotted to Murphy, Manning and Elliott, which mistake was afterwards sought to be rectified by another supplementary notice, placed on record for that purpose, in the Register of Deeds office, in Sept., 1877.

(*Pr. record 35.*)

COMMENT:—All the importance that can be attached to this finding is: that one of the usual acts of location, viz: recording the certificate was performed, but the certificate recorded declared plainly enough an invalid location on its face, and the supplementary one could not "cover" this illegality, although that is its declared purpose.

Finding XIII:—That in November, 1877, the claimants of the so-called Caledonia mining claim caused a survey thereof by Smith & Ankenny, which survey substantially corresponded with the original location of said claim.

(*Pr. record 36.*)

COMMENT:—As an independent fact this finding is of

no consequence. This survey was not intended as an act of location or re-location. The statement of the concurrence of the lines of this survey with those of the "original location," and "those marked on the ground by posts on the 28th day of February and the 1st day of March,, 1877" serves to keep plaintiff's and the court's theory, fresh in the mind. Not in a single instance, do they concede the invalidity of the original location. Everything pertaining to the Caledonia is referred to this location, and upon it the plaintiffs title hinges and depends.

Finding XIV.—That on March 2nd, 1878, the *owners(?)* of the Caledonia mining claim posted a notice or certificate of locstion on a tree near the Discovery shaft, and afterwards on the same day filed a copy of it in the Register of Deeds office; the notice reciting that it was a new location notice of that date, and that the claim was first located June 15th, 1876. The metes and bounds, courses and distances of the relocation—so called, according to the field notes of the Smith and Ankeny survey of November 14th, 1877, are set out without any suggestion of their being in any particular incorrect. (*Pr. record 36, 37, 38.*)

COMMENT:—This location notice has some value in this controversy, or it has not. It was seriously offered as pertinent proof, by the plaintiff, to support the issues on its part; and it was gravely received against defendant's objection by the trial court. No acts of a new location are found, except the posting and record of this notice. Are they to be presumed? The description of the ground claimed as the Caledonia lode in this notice, is east, and outside of the "old original" one of June, 1876; and that it does not include the ground in controversy described in the complaint and for which the district court rendered judgmsnt, is apparent at a glance. (*See diagram on page 64 of this brief.*

Finding XV.—That the original plaintiffs performed more than the amount of annual representation work on the Caledonia mining claim from the 15th of June, 1876, until the 15th of June, 1878. (*Pr. record 38.*)

Finding XVI.—That the locators and owners of the Caledonia performed more than one thousand dollars worth of work on the claim after February 28th and prior to February 28th, 1878; and more than another thousand dollars worth before they sold to Bell. (*Pr. record 38.*)

Finding XVII.—That after February 28th, 1877, and before they sold to Bell, the locators and owners of the Caledonia performed more than $2,000 worth of work on the Caledonia claim, and were in actual possession at the time of sale. (*Pr. record 38.*)

COMMENT:—These last three are very unimportant findings of fact to say the least; except that they speak well for the industry of the parties referred to. The Act of Congress entitled "An Act to promote the development of the mining resources of the United States passed May 10th, 1872, was amended June 6th, 1874, extending the time for the first annual expenditure of labor and improvements on mining claims located before that time, to the first day of January, 1875; and by a subsequent act passed January 22d, 1880, Congress extended the period within which the work required *to be done annually*, on all unpatented mineral claims, to the end of the year succeeding the year of location, and it made this amendment applicable to all claims located since May 10th, 1872. This was the law for months before this trial began. Hence, one hundred dollars of expenditure in labor or improvements on any valid mining location in the Black Hills after February 28th, 1877, and prior to the first day of January, 1879, satisfied the requirement of the law. Why then this great parade of thousands of dollars expended in a few months on an invalid one, in these findings? The right of possession on trial, was and is a legal

one, to be determined by priority of location, and compliance with the mining rules and regulations at the time the action was begun, June 14th, 1878. Only a valid discovery, within the lines of the location, a cut, or tunnel, at a depth sufficient to disclose the mineral vein or lode, or an adit of at least ten feet in length along the lode, or a discovery shaft sufficient to show a well defined mineral vein or lode, was necessary to be proved and found. No supplemental pleadings setting forth matters arising after the action was begun, were in the case; and these last three findings are of no special value.

Finding XVIII:—That the so-called owners of the Caledonia on August 30th, 1878, sold and conveyed the location of June, 1876 to Bell; and that Bell sold and conveyed the same to the plaintiff in December, 1878.

(*Pr. record 39.*)

COMMENT:—The fact hardly merited a finding. There is no controversy about it, at all. The only question is: did they get anything by the conveyance.

Finding XIX:—That the plaintiff is and has been since the sale to it by Bell in possession of the Caledonia mining claim and of the ground in controversy; and has continously mined the same, and expended in work and improvement thereon more than ten thousand dollars; and each year since February 28th, 1878, has annually done more than one hundred dollars worth of work on the claim.

(*Pr. record 39.*)

COMMENT:—This is the last finding of fact relating to the so-called Caledonia lode; and it is of no consequence at all, as has already been shown. No annual representation work was required to be done before this action was commenced. What occurred, or what was necessary to be done after that time was not in issue; nor could it

be properly brought into the trial, except by supplementary pleadings in the action.

After a review of the findings, we respectfully submit, that they are insufficient to justify the decision of the court in this case, and that the judgment rendered ought to be reversed.

It is not expected by the defendants that the court will examine and pass upon all the assignments of error. Indeed the number is quite large, but only a few of the principal ones need be considered. For instance:

The First one—That the judgment is not sustained by the pleadings.

The Second one—That the court erred in admitting in evidence the copy of the Articles of Incorporation of the plaintiff.

The Sixth one—That the court erred in admitting in evidence the testimony of Michael Lynch as to matters occurring prior to February 28th, 1877, in attempting to make the Caledonia lode location, upon the Indian Reservation.

The Twenty-fourth—That the court erred in admitting in evidence the deed from the former plaintiffs in this action to Thomas Bell of date of August 31, 1878.

The Thirty-ninth—That the court erred in admitting in evidence the deposition of William R. Keithly with the exhibits named from A. to H.

The Sixtieth—That the court erred in admitting in evidence the deposition of Henry S. Ireton on rebuttal.

The Seventieth—That the court erred in admitting in evidence a copy of the Miners Rules and Regulations adopted December 30th, 1876: and

The findings of the court as to the Caledonia lode location, before February 28th, 1877, and the pretended re-

location of March 2d, 1878, need to receive consideration, as it is clearly manifest they do not include the same ground, and the latter does not include the ground in controversy.

THE THIRTY-NINTH AND FORTIETH ASSIGNMMENT OF ERROR

deserve special notice.

On the rebuttal the deposition of one William R. Keithly was offered in evidence and read against defendant's objection. He was sworn, and examined as a witness to identify certain papers prepared by him and under his direction and inspection, purporting to be copies of depositions that had been taken in this, and in other actions, between other plaintiffs and this defendant. He is supposed to have identified them as exact copies, and they are attached to his deposition as Exhibits A, B, C, D, E, F, G, and H. The original depositions were believed to have been destoyed by the fire that consumed Deadwood in September, 1879.

(*Pr. record 235.*)

Exhibit A, is a purported copy of a deposition made by Daniel G. Chisholm at Glasgow, Jefferson county, state of Iowa, on April 17th, 1879, before one J. S. Kreitzler, Notary Public, on behalf of plaintiff. No notice of the time and place of the taking of the deposition appears to have been given given to the defendant, or his attorneys; no waiver of the notice is shown, and there is no appearance by the defendant, or on his behalf. There is no evidence that the original was ever received, filed or opened by the clerk of the court; and this one will do to sample the entire lot annexed to and made a part of the Keithly deposition.

On the face of the record there is no authority for even the original to have been recived in evidence, were it

offered. It was clearly incompetent, in our judgment.

(*Pr. record 244 to 250.*)

Exhibit B, is a purported copy of a deposition of Francis Coyle, which shows no certificate of the officer before whom it was taken, nor when or where it was taken.

(*Pr. record 295.*)

Purported copies of depositions taken in two other cases, to-wit: James Delaney *et al.* vs. John Noonan, involving a contest between the Queen of the Hills lode and the Bobtail, and James Harrington, *et al.* vs. John Noonan involving a contest between the Clara No. 2, lode and the Bobtail lode were thus "railroaded" into, and made a part of the Keithly deposition.

(*Pr. record 237-8.*)

Depositions taken by plaintiff in the two cases last mentioned, as well as oral testimony, reeking with irrelevant accounts of the unlawful doings and declarations of the Queen of the Hills claimants, Clara No. 1 and Clara No. 2, claimants; armed and blustering factions on Clara Hill neighborhood rows, drunken, defiant mobs, and a thousand other matters that occurred in that locality in the summer and fall of 1876, were allowed to go in as evidence in this case, until the record (which contains all the evidence as the judge certifies) has been swollen out of proportion and shape, despite defendants objections to the incompetency of this testimony, and that it had no legal relation to the controversy in this action. No attempt had been made to substitute these copies for the originals before the trial and file them before the trial so that defendant could have filed his motion to suppress.

We are assured by counsel for plaintiff that this court will not look into the evidence to ascertain whether the findings are supported by sufficient evidence or not. No doubt this is the rule. But if there ever was an excep-

tional case to a rule, this ought to be made one. Enough has been already shown to make it appear that the rulings and findings of the trial judge, and his conclusions of law in this case, were extraordinary throughout. Attention is called to the evident bias or zeal of this most erudite jurist in this case, who imported into the opinion of the Territorial Supreme Court facts that do not appear of record, viz: that "Mahan was in court * * * assisting in the conduct of the defense," as an apology for the neglect of the plaintiff's attorneys and the omission of the trial court, to properly make him a party defendant, by service of a proper pleading in the action. It seems to us, that nearly the entire opinion of the Supreme Court—prepared and delivered by the trial judge, as a member of that court, is a labored defense to uphold his rulings and findings in the court below; and directly in conflict with three previous decisions of said Supreme Court. (*Uhlig v. Garrison; French v. Lancaster; Golden Terra Company vs. Smith*,) already cited; and in opposition to views of this court on similar questions, in the cases of *Belk v. Meagher*, *Drummond v. Magruder*, and *Paul vs. Virginia*, to which reference has been made in this Brief.

We confidently anticipate a reversal of the judgment and decree appealed from; and a direction to the inferior court to enter judgment for defendant Noonan.

DANIEL McLAUGHLIN,
WILLIAM R. STEELE,
Attorneys for Appellants

APPENDIX.

LAWS OF DAKOTA TERRITORY.

CHAPTER XXXI.

RELATING TO MINES AND MINING.

Sec. 1. The length of any lode claim hereafter located within this territory, may equal, but shall not exceed, fifteen hundred feet along the vein or lode.

Sec. 2. The width of lode claims shall be one hundred and fifty feet on each side of the center of the vein or crevice; *Provided*, That any county may at any general election, determine upon a greater width not exceeding three hundred feet on each side of the center of the vein or lode, by a majority of the legal votes cast at said election, and any county by such vote at such election, may determine upon a less width than above specified; *Provided*, That not less than twenty-five feet on each side of the vein or lode shall be prohibited.

Sec. 3. That the discoverer of a lode shall within twenty days from the date of discovery, record his claim in the office of the register of deeds of the county in which such lode is situated, by a location certificate, which shall contain:

1. The name of the lode.
2. The name of the locator.
3. The date of location.

4. The number of feet in length claimed on each side of the discovery shaft.

5. The number of feet in width claimed on each side of the vein or lode.

6. The general course of the lode, as near as may be.

Sec. 4. Any location certificate of a lode claim which shall not contain the name of the lode, the name of the locator, the date of location, the number of lineal feet claimed on each side of the discovery shaft, the number of feet in width claimed, the general course of the lode, and such description as shall identify the claim with reasonable certainty, shall be void.

Sec. 5. Before filing such location certificate the discoverer shall locate his claim by first sinking a discovery shaft thereon sufficient to show a well defined minera- vein or lode; second, by posting at the point of discovery on the surface, a plain sign or notice containing the name of the lode, the name of the locator, and the date of discovery, and the number of feet in width claimed on each side of the lode; third, by marking the surface boundaries of the claim.

Sec. 6. Such surface boundaries shall be marked by eight (8) substantial posts, hewed or blazed on the side or sides, facing the claim, and sunk in the ground, to wit: One at each corner, and one at the center of each side line, and one at each end of the lode. When it is impracticable on account of rock or preciptious ground to sink such posts, they may be placed in a monument of stone.

Sec. 7. Any open cut, cross cut, or tunnel, at a depth sufficient to disclose the mineral vein or lode, or an adit of at least ten (10) feet in along the lode, from the point where the lode may be in any manner discovered, shall be equivalent to a discovery shaft.

Sec. 8. The discoverer shall have thirty days from the time of uncovering or disclosing a lode to sink a discovery shaft thereon.

Sec. 9. The location or location certificate of any lode claim shall be construed to include all surface ground within the surface lines thereof, and all lodes and ledges throughout their entire depth, the top or apex of which lie inside of such lines extended vertically, with such parts of all lodes or ledges as continue, by dip beyond the side lines of the claim, but shall not include any portion of such lodes or ledges beyond the end lines of the claim or the end lines continued, whether by dip or otherwise, or beyond the side lines in any other manner than by the dip of the lode.

Sec. 10. If the top or apex of the lode in its longitudinal course extends beyond the exterior lines of the claim at any point on the surface, or as extended vertically downward, such lode may not be followed in its longitudinal course beyond the point where it is intersected by the exterior.

Sec. 11. All mining claims now located, or which may be hereafter located, shall be subject to the right of way of any ditch or flume for mining purposes, or of any tramway or pack trail which is now in use, or which may be hereafter laid out across any such location. *Provided, always*, That such right of way shall not be exercised against any location duly made and recorded, and and not abandoned prior to the establishment of the ditch, flume, tramway or pack-trail, without consent of the owners except by condemnation, as in cases of land taken for public highways; parol consent to the location of any such easement, accompanied by the completion of the same over the claim, shall be sufficient without writing; *And provided further*, That such ditch or flume shall not injure vested rights by flooding or otherwise.

Sec. 12. When the right to mine is in any case separate from the ownership or right of occupancy to the surface, the owner or rightful occupant of the surface may demand satisfactory security from the miner, and if it be refused may enjoin such miner from working until such security is given. The order for injuction shall fix the amount of bond.

Sec. 13. If at any time the locator of any mining claim heretofore or hereafter located, or his assigns, shall apprehend that his original certificate was defective, erroneous, or that the requirements of the law had not been complied with before filing, or shall be desirous of changing his surface boundaries, or of taking in any part of an overlapping claim which has been abandoned, or in case the original certificate was made prior to the passage of this law, and he shall be desirous of securing the benefit of this act, such locator, or his assigns, may file an additional certificate subject to the provisions of this act: *Provided*, That such relocation does not interfere with the existing rights of others at the time of relocation, and no such relocation or the record thereof shall preclude the claimant or claimants from proving any such title or titles as he or they may have held under previous locations.

Sec. 14. The amount of work to be done or improvements made during each year to hold possession of a mining claim, shall be that prescribed by the laws of the United States, to wit: One hundred dollars annually.

Sec. 15. Within six months after any set time or annual period herein allowed for the performance of labor or making improvements upon any lode claim, the person on whose behalf such outlay was made, or some person for him, shall make and record an affidavit in substance, as follows:

Territory of Dakota, } ss
County of..... }

Before me, the subscriber, personally appeared..... who being duly sworn, says at least.....dollar' worth of work or improvements were performed or made upon (here describe claim or claims, or part thereof,) prior to the.....day of.....A. D. 18..situate in.....mining district, county of.....Territory of Dakota. Such expenditure was made by or at the expense of.....owner of said claim, for the purpose of holding said claim.

(Jurat.) (Signature.)

And such certificate, when recorded in the office of the register of deeds of the county wherein such claim is located, shall be prima facie evidence of the performance of such labor.

Sec. 16. The relocation of abandoned lode claims shall be by sinking a new discovery shaft, and fixing new boundaries, in the same manner as if it were the location of a new claim, or the relocator may sink the original shaft, cut or adit to a sufficient depth to comply with sections five and seven of this chapter, and erect new or adopt the old boundaries, renewing the posts if removed or destroyed. In either case, a new location stake shall be erected. In any case, whether the whole or part of an abandoned claim is taken, the location certificate must state that the whole or any part of the new location is located as abandoned property.

Sec. 17. No location certificate shall claim more than one location, whether the location be made by one or several locators; and if it purport to claim more than one location, it shall be absolutely void, except as to the first location therein described; and if they are described together, or so that it cannot be told which location is first described, the certificate shall be void as to all.

Sec. 18. The register of deeds shall be entitled to receive the sum of one dollar for each location certificate recorded and certified by him, and shall furnish the locator or locators with a certified copy of such certificate

when demanded, for which he shall be entitled to receive fifty cents.

DISPUTED MINING PROPERTY.

Sec. 19. In all actions in any district court of this territory, wherein the title or right of possession to any mining claim shall be in dispute, the said court or the judge thereof, may, upon application of any of the parties to such suit, enter an order for the underground as well as surface survey of such part of the property in dispute as may be necessary to a just determination of the question involved. Such order shall designate some competent surveyor, not related to any of the parties to such suit, or in anywise interested in the result of the same; and upon application of the party adverse to such application, the court may also appoint some competent surveyor, to be selected by such adverse applicant, whose duty it shall be to attend upon such surveyor, and observe the method of making the same; said second survey to be at the cost of the party asking therefor. It shall also be lawful in such order to specify the names of witnesses named by either party, not exceeding three on each side, to examine such property, who shall be allowed to enter into such property and examine the same: such court, or the judge thereof, may also cause the removal of any rock, debris, or other obstacle in any of the drifts or shafts of said property, when such removal is shown to be necessary to a just determination of the question involved; *Provided, however*, That no such order shall be made for survey and inspection, except in open court or in chambers, upon notice of application of such order of at least six days, and not then except by agreement of parties, or upon the affidavit of two or more persons that such survey and inspection is necessary to the just determination of the suit, which affidavits shall state the facts in such case, and wherein the necessity for survey exists; nor shall such order be made unless it appears

that the party asking therefor had been refused the privilege of survey and inspection by the adverse party.

Sec. 20. The district courts, or any judge thereof, sitting in chancery, shall have, in addition to the power already possessed, power to issue writs of injunction for affirmative relief, having the force and effect of a writ of restitution, restoring any person or persons to the possession of any mining property from which he or they may have been ousted by force or violence, or by fraud, or from which they are kept out of possession by threats, or whenever such possession was taken from him or them by entry of the adverse party on Sunday, or a legal holiday, or while the party in possession was temporarily absent therefrom. The granting of such writ to extend only to the right of possession under the facts of the case, in respect to the manner in which the possession was obtained, leaving the parties to their legal rights on all other questions as though no such writ had issued.

STATUTORY.

RULES OF EVIDENCE IN DAKOTA TERRITORY RELATING TO PUBLIC DOCUMENTS, RECORDS, &C.

Sec. 488. Printed copies in volumes of statutes, code, or other written law, enacted by any other territory or state, or foreign government, purporting or proved to have been published by authority thereof, or proved to be commonly admitted as evidence of the existing law in the courts or tribunals of such territory, state or government, shall be admitted by the courts and officers of this territory on all occasions, as presumptive evidence of such laws. The unwritten or common law of any other territory, state or foreign government, may be proved as facts by parol evidence; and the books of reports of cases ad-

judged in their courts may also be admitted as presumptive evidence of such law. The term "public document" is defined to be all the publications and maps printed by order of the legislative assembly, or congress, or either house thereof; and all such documents are admissible in evidence.

Sec. 489. Copies of the records and judicial proceedings of any court of any state or territory of the United States, shall be admissible in evidence in all cases in this territory, when attested by the clerk and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the attestation is in due form. And the said records and judicial proceedings so authenticated shall have such faith and credit given to them in every court within this territory as they have by law or usage in the courts of the state or territory from which they are taken.

Sec. 490. The affidavit of any printer, foreman of any printer, or publisher of any newspaper published in this territory, of the publication of any notice, order, or advertisement which, by any law of this territory, shall be required or authorized to be published in such newspaper, shall be entitled to be read in evidence in all courts of justice, and in all proceedings before any officer, board or body, and shall be prima facie evidence of such publication and of the facts stated therein.

Sec. 491. A transcript from the docket of any justice of the peace, of any judgment had before him, of the proceedings in the action, of the execution issued thereon, if any, and of the return to such execution, if any, when certified by such justice, shall be evidence to prove the facts contained in such transcript in any court, or legal proceedings in the county or subdivision wherein such judgment was rendered.

Sec. 492. And such transcript may be read in evidence in any other county or subdivision, when there shall be attached thereto a certificate of the clerk of the district court, of the county or subdivision in which such judgment was rendered, under the seal of the court, to the effect that the person subscribing such transcript was, at the date of the judgment therein mentioned, a justice of the peace of such county.

Sec. 493. Every instrument in writing, which is acknowledged or proved, and duly recorded, is admissible as evidence without further proof.

Sec. 494. The record of such instrument, or a duly authenticated copy thereof, is admissible in evidence whenever, by the party's own oath, or otherwise, the original is shown to be lost, or not belonging to the party wishing to use the same, and not within his control.

Sec. 495. Entries in public or other official books or records, made in the performance of his duty by a public officer of this territory, or by another person in the performance of a duty specially enjoined by law, are prima facie evidence of the facts stated therein.

Sec. 496. An entry made by an officer, or board of officers, or under the direction and in the presence of either, in the course of official duty, is prima facie evidence of the facts stated in such entry.

Sec. 497. Whenever a copy of a writing is certified for the purpose of evidence, the certificate must state in substance that the copy is a correct copy of the original, or of a specified part thereof, as the case may be. The certificate must be under the official seal of the certifying officer, if there be any, or, if he be the clerk of a court, having a seal, under the seal of such court.

121-393

In the Supreme Court of the United States.

OCTOBER TERM, 1886.

No. 170.

JOHN NOONAN AND THOMAS F. MAHAN, APPELLANTS,

vs.

THE CALEDONIA GOLD-MINING COMPANY (Incorporated), RESPONDENT.

Appeal from the Supreme Court of Dakota Territory.

BRIEF OF RESPONDENT,

THE CALEDONIA GOLD-MINING COMPANY.

T. L. SKINNER AND
S. S. BURDETT,
Att'ys for Respondent.

WASHINGTON, D. C.
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1887.

Supreme Court of the United States.

OCTOBER TERM 1886.—No. 170.

JOHN NOONAN AND THOMAS F. MAHAN,
APPELLANTS,

v.

THE CALEDONIA GOLD-MINING COMPANY,
RESPONDENT.

Appeal from the Supreme Court of Dakota Territory.

BRIEF FOR THE RESPONDENT.

Not considering the statement of this case as contained in the brief of counsel for the appellants to be complete, the respondent submits the following

STATEMENT OF THE CASE.

This is an action brought under chapter six of the Revised Statutes of the United States relating to "Mineral Lands and Mining Resources."

Under the provisions of Sec. 2325 R. S., the appellant, John Noonan, who was defendant below, made application as sole owner and claimant, at the proper local land office

(Deadwood, Dakota), for a patent for a tract of mineral land known as the "Bobtail Lode."

Pending this application the predecessors of the respondent, who were plaintiffs below, and who were the owners of the "Caledonia Lode claim," filed in the local office, pursuant to the provisions of said Sec. 2325 and of Sec. 2326 R. S., a claim adverse to the said Bobtail application, alleging that the Bobtail application unlawfully included a portion of the said Caledonia Lode. They also began their action in the proper district court for the settlement of the controversy, as is required by the said Sec. 2326.

The claimants of the Caledonia Lode, at the time of the commencement of the said adverse proceedings, and who constituted the party plaintiff in the original complaint, were Henry Lackey, Louis P. Elliott, John M. Murphy, James Lynch, Michael Heffron, James Manning, John Morrow, Peter O'Neill and Robert Curlin. (Record, p. 4). Pending the trial of the cause, these parties sold and conveyed their interest to Thomas Bell, of San Francisco, California, who, in turn, conveyed the property to the "Caledonia Gold Mining Company," which was substituted as plaintiff below and is the respondent here.

The land in controversy is situated in the "Black Hills country," and is within the boundaries of the general tract of land set apart for the use of the different tribes of Sioux Indians by the second article of the treaty proclaimed February 24, 1869. (15 Stat., 635). It is also a part of that tract which was ceded and relinquished to the United States by Article I of an agreement made with the Sioux Indians, in Sept. and Oct., 1876, and was ratified by the act of Congress approved February 28, 1877 (19 Stat., 254).

The original complaint (Record, p. 4) was filed July 8, 1878. The answer thereto (Record, p. 7) was filed October 14, 1878. The issue joined was that the acts done which

constituted the initiation and basis of title of the respective parties began on the part of the Caledonia claimants by a location of their mine and claim on June 21, 1876, and on the part of the Bobtail claimants by a location made February 24, 1876. Neither of the parties set up, by these pleadings, any subsequent, supplemental, or additional location.

The pleadings on which the trial below proceeded are—

The amended and substituted complaint (Record, p. 10) and amendment thereto (Record, p. 26), the answer of John Noonan (Record, p. 15), and the replication to the new matter and separate causes of defence set out by defendant in his answer (Record, p. 18).

The amended and substituted complaint alleges plaintiff's incorporation, September 19, 1878, under the laws of California, its compliance with the laws of Dakota relating to foreign corporations, and the resulting right to transact business in the territory.

Transfer of the Caledonia property, by deed, to Thomas Bell, August 30, 1878. Transfer by Bell, by deed, to the "Caledonia Gold Mining Company," plaintiff, December 10, 1878.

Location of Caledonia Lode claim, June 21. 1876, and actual possession by the locators on that day.

Additional and supplemental location of the Caledonia claim, March 15, 1877, by grantors of plaintiff and successors in interest of the original locators.

That the said grantors of plaintiff, on the 15th day of March, 1877, being "then the owners of and in the possession of said claim, made an additional and supplementary claim and location of said Caledonia claim, and on the same day caused a certificate or notice of said original claim and location, and of said additional and supplementary claim and location to be recorded in the mining records." (Record, p. 11).

Alleges abandonment by Chizum, one of the original locators of the Bobtail, prior to the sale to Mahan, June, 1877.

Pleads forfeiture of Bobtail by reason of failure to do annual work for the years 1876, 1877, and 1878; pleads Noonan's averment that he was sole owner of the Bobtail Lode, and that he is estopped from setting up non-joinder of defendants; avers abandonment by Chizum, and the actual and exclusive possession of the original locators and their grantees, of the Caledonia Lode, of the ground in controversy, at the time of such abandonment, and the subsequent relocation of the Caledonia, March 2, 1878.

Avers abandonment by Ireton, another of the original locators of the Bobtail, in September, 1876, and that at that time, and long prior thereto, the owners of the Caledonia lode who were the predecessors in interest of the plaintiff had been in the actual and exclusive possession of the mining ground in controversy, claiming title thereto, and that after said abandonment the owners of the Caledonia, in actual possession, relocated the Caledonia lode (Record, p. 23).

Forfeiture by Ireton, Chizum, and Mahan of their interest in the Bobtail, by reason of their failing to do the annual work thereon, and the relocation of the Caledonia Lode, including the ground in controversy, on the 15th day of March, 1877, by the owners thereof.

Forfeiture by Ireton, Chizum and Mahan of their interest in the Bobtail Lode, and a re-location of the Caledonia by the then owners, March 2, 1878, including the ground in controversy, and before the resumption of work on the Bobtail (Record, p. 24).

That any deed or grant by Ireton and Chizum to said ground in controversy was void, the then owners of the Caledonia being in the actual possession of the same.

That the grantors and predecessors of the plaintiff were

in the actual possession of the Caledonia Lode on the 28th day of February, 1877, and on the 1st day of March, 1877, including the ground in controversy, with boundaries clearly marked and defined, and were in such possession in accordance with the laws of the United States and Territory of Dakota, and have ever since so been in possession. (Record, p. 25).

On page 25 appears the following minute entry:

"Caledonia Gold Mining Company *v.* John Noonan.
"Now on this 15th day of July, A. D. 1880, the trial of "this cause is resumed. By consent of all parties Thomas "F. Mahan is made a party defendant in this action. "Counsel for defendant appear and answer instanter for "him any amendments to pleadings required to be pre- "pared and served during the pending of this action "or at its conclusion."

On page 26 appear two paragraphs, served on the 14th day of December, 1880, amending the amended and substituted complaint by inserting therein, at certain places mentioned, the certain matter contained in said amendment, deemed necessary to make the pleading complete in showing Thomas F. Mahan a party defendant.

The district court found the facts and the law for the plaintiff. (Record, pp. 27 to 45). A summary of the findings, as stated by the district court, is at pages 52 and 53 of Record. The final decree was for plaintiff. (Record, p. 67). Remarks of district judge accompanying the decision. (Record, p. 45). The decree of the district court was, by the supreme court of the Territory, in all things affirmed. (Record, p. 314). Opinion of the court, Record, p. 316.

ARGUMENT FOR RESPONDENT.

As the brief on behalf of the appellants contains in full what counsel rely upon as their assignment of error, com-

mencing on page 18 and continuing in consecutive order to the 90th assignment, we do not here re-embody it, but shall endeavor to discuss each of the propositions advanced by appellants in the order in which they have placed them in their brief.

On page 7 of appellants' brief it is stated:

That, while the defendant's motion for a new trial was under judicial consideration, plaintiff served its replication. This does not so appear from the Record. The replication was served and filed February 2, 1880 (Record, p. 25), four months prior to the cause being brought on for a hearing, July 12, 1880. (Record, p. 67).

The first question discussed by appellants is thus stated:

"THE JUDGMENT IN THIS CASE IS NOT SUSTAINED BY THE PLEADINGS." (Brief, p. 8).

This is argued upon, what appears to be, three propositions:

1st. That the district court did not obtain jurisdiction over the defendant, Thomas F. Mahan.

2d. That the amendment made to the original amended and substituted complaint, set out on p. 26 of the Record, was a fatal irregularity in method and form of pleading.

3d. That the complaint itself does not state facts sufficient to constitute a cause of action.

(1). Taking these propositions in their order, the first or jurisdictional question is negatived by the Record. Admitting that the jurisdiction of an inferior court may at all times be questioned and reviewed has no bearing upon this question. The district court gained jurisdiction over the defendant, Mahan, on the 15th day of July, 1880, that being the third day of the trial (Record, pp. 25 and 26), when, by his consent, expressed through licensed counsel of that court, the order making him a party was made in open court and in the presence and with the

knowledge of Mahan; he thereafter attending and voluntarily waiting upon the court as a defendant, accepting and acting in that position and character by his motion to correct the findings of the court (Record, pp. 53, 55); his motion for a new trial (Record, p. 56); his appeal to the supreme court of the Territory of Dakota (Record, p. 1); his appeal to this honorable court (Record, p. 324). Appellants, at page 11 of their brief, admit the jurisdiction of the district court over the defendant Mahan. There being no question of jurisdiction, other objection cannot be raised for the first time in an appellate tribunal.

We fail to see the relevancy of the references to C. C. Pro., Subd. 2, sec. 229, C. C. Pro., sec. 99. The consent order, on page 25 of Record, stipulates an immediate appearance for Mahan, and an instant and immediate answer for him, waiving all statutory time, which every party has a present right to do.

"A voluntary appearance of a defendant is equivalent to personal service of the summons upon him." (C. C. Pro., Dak., sec. 108.)

Jones *v.* Andrews, 10 Wal., 327.
Atkins *v.* Disint. Co., 18 Wall., 272.
Farrar *v.* U. S., 3 Pet., 459.
Toland *v.* Sprague, 12 *Id.*, 300.
Gracie *v.* Palmer, 8 Wheat., 699.
Knox *v.* Summers, 3 Cranch, 496.
Pollard *v.* Dwight, 4 Cranch, 420.

Counsel may appear for a party to an action, and bind him by such appearance.

Pol. C. Dak., chap. 18, sec. 6.
Reynolds *v.* Fleming, 30 Kansas (Randolph), 106.

(2.) The second proposition is that the manner and form of the amendment was a fatal irregularity.

This amendment is in no sense an amended pleading, was never intended to be so taken, nor was it so treated by the learned counsel at that time. It is a mere statement of certain matters which, under the consent order of the court, were necessary to be inserted in the original amended and substituted complaint, to show upon the pleadings that Mahan was a defendant, and to make those pleadings conform to the judgment. If the district court acted upon the matter as counsel for both sides had treated and considered it during the entire trial, it is a mere question of practice of that court which this tribunal will not review.

Parks *v.* Turner, 12 How., 39.
Buffington *v.* Harvey, 95 U. S., 99.
Wright *v.* Hollingsworth, 1 Pet., 168.
Eberly *v.* Moore, 24 How., 147.
Adam *v.* Norris, 103 U. S., 591.

This amendment was made in pursuance of the provisions of the Code of Dakota.

C. of C. Pro., D. T., secs. 142, 143, 146.

It was not made or filed till after Mahan had appeared voluntarily in a motion to correct the findings of the trial court; and his motion for a new trial does not mention it as a ground therefor.

Section 142 specially refers to the power to add to or strike from the pleadings, and to cause them, by an amendment, to conform to the facts proven.

Sec. 142 is as follows:

"The court may, before or after judgment, in furtherance of justice, and such terms as may be proper, amend any pleading, process, or proceeding, by adding or striking out the name of any party; or by correcting a mistake in

the name of a party, or a mistake in any other respect; or by inserting other allegations material to the case; or, when the amendment does not change substantially the claim or defence, by conforming the pleading or proceeding to the facts proved."

That this amendment was not verified is of no consequence. Adding or striking out the name of a party does not necessitate a reverification, and the amendment may be inserted into the original by order of the court.

Miller's P. & P., pp. 245, 246.

Even if the insertion, by order of the court or otherwise, of an amendment into a verified plea obviates and obliterates the verification, an objection by the adverse party is waived, unless he then and there notes such objection.

C. of C. P., D. T., Sec. 145.
Adam *v.* Norris, 103 U. S., 591.
Power *v.* Gum, 9 Pac. Rep., 575.
Robins *v.* Benson, 6 Pac. Rep., 69.
Kuhland *v.* Sedgwick, 17 Cal., 123.

The rule has always been, and it is now declared by statute, that at any time before or after judgment, the court may amend the pleadings in furtherance of justice, &c., and if it becomes apparent, upon appeal even, that such amendment is necessary, the Supreme Court may then and there cause the amendment to be made or consider it as done.

Wait P. & P., 2 V., 757 *et seq.*
Pratt *v.* Hudson River R.R. Co., 21 N. Y., 305.
Bate *v.* Graham, 11 *Id.*, 237.
Lounsberry *v.* Pardy, 18 *Id.*, 520.
Bamberger *v.* Terry, 103 U. S., 40.

The allowance of an amendment to a pleading and its form rest solely in the discretion of the trial court. This court will not review it.

Wright *v.* Hollingsworth, 1 Pet., 165.
U. S. *v.* Buford, 3 *Id.*, 12.
Eberly *v.* Moore, 24 How., 147.
Mandeville *v.* Wilson, 5 Cranch, 15.

There has been no surprise to Mahan in this matter, no injury worked to or advantage taken of him. If any error was committed it is one which this court will disregard for two reasons: It was trivial, and no objection was taken to the amendment by the bill of exceptions.

"The court shall, in every stage of action, disregard an error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect."
(C. of C. P., D. T., Sec. 145).
Imhoff *v.* the Chicago & Mil. R.R. Co., 22 Wis., 681.

Defect or want of form in process or pleading is to be disregarded, and judgment, notwithstanding, given according to the right of the cause and matter, except where specially raised on demurrer, is the rule prescribed in Sec. 954 R. S.

Railroad Co. *v.* Lindsay, 4 Wall., 650.
Ewing *v.* Howard, 7 *Id.*, 499.

(3). The third proposition, "That the complaint does not state facts to constitute a cause of action," is raised here for the first time. We submit the pleadings to this honorable court.

The point urged appears to be that it is necessary, in this class of actions, to aver a detailed compliance with all

the law bearing upon the location of quartz-mining claims, and that while plaintiff set out such detailed compliance, the acts so set forth were done when the country was Indian territory, and were therefore void, and no title could flow from them; that the location of March 15, 1877, was a nullity, it being called an additional and supplemental location to what appellants term a void location.

This, we submit, is a mere play upon words. The plea sets out a full compliance with all the requirements of the law on the 21st day of June, 1876. If this constituted no foundation of title, the objection should have been raised by demurrer or answer; but this appellants did not do, but answered over and asserted a title in themselves, based upon the very same acts and circumstances, and done within the same alleged term of Indian occupancy.

We call attention to the 2d subdivision of the 3d paragraph, and the 4th paragraph of the complaint (Record, pp. 11 and 12).

The complaint, 4th paragraph, contains this clause: "That it (the plaintiff) and its predecessors in interest have been in the actual and continuous possession of the said lode and claim (Caledonia), claiming title thereto, ever since the 21st day of June, 1876, aforesaid, and have at all times held and possessed the same in accordance with the laws of the United States and of the Territory of Dakota, and the local rules, customs," &c.

This, we submit, is an allegation of complete compliance with all the requirements of the law, and sufficient allegation to support a finding of title upon evidence showing the performance of the preliminary acts of location.

McAllister *v.* Kuhn, 96 U. S., 87.

Verdict cures a defect in pleading, whether in substance or form, which would have been fatal on demurrer

if the issue joined be such, as necessarily required on the trial proof of the facts so defectively stated or omitted.

Lincoln *v.* Iron Company, 103 U. S., 412.
Adam *v.* Norris, *Id.*, 591.

The replication of the plaintiff reasserts the continuous possession of the claim, in conformity with law and regulation, from the day of the discovery until the day of filing the complaint.

A location may be valid and defensible though every requirement of the regulations may not have been complied with in full form. Hence, failure to plead particulars, not in themselves indispensable, cannot be, at any stage, matter of serious objection.

It is unnecessary to show the erection of a notice and the recording of the same so long as the claimants have made a discovery, marked their boundaries, and have been in the actual, continuous, and exclusive possession.

That is to say, the laws of the miners, established by custom and usage, do not make the posting and recording of what is commonly called a location notice obligatory and precedent acts to acquiring a valid possessory title, unless such laws and customs so declare in express terms, invalidating the location for non-compliance therewith.

Golden Fleece Co. *v.* Cable Co., 12 Nev., 312.
Bell *v.* Bed Rock Co., 36 Cal., 214.
McGarrity *v.* Byington, 12 Cal., 426.
Weill *v.* Lucern M. Co., 11 Nev., 200.
Jupiter M. Co. *v.* Bodie Co., 7 Saw., 96.

Posting and recording a location notice is for the purpose of creating a constructive possession, unless made

one of the necessary acts to be performed prior to the acquiring of any legal rights to the location.

Pollard *v.* Shively, 5 Colo., 309.
Attwood *v.* Fricot, 17 Cal., 38.
Jupiter M. Co. *v.* Bodie Co., 7 Saw., 96.
Roberts *v.* Wilson, 1 Utah, 292.
Campbell *v.* Rankin, 99 U. S., 261.
Faxon *v.* Barnard *et al.*, 2 McCrary, 44.

Actual, continued, and exclusive possession, or actual and continued possession, of a mining location, under color and claim of right and title, when the boundaries of the location are well established and marked, a proper and sufficient discovery of rock in place bearing gold made thereon, and continuous working thereon, is sufficient to support an action of ejectment against a stranger or trespasser, or one having no better right, and is sufficient to support an action to determine the right of possession in this class of actions under the United States laws, relating to actions to determine right of possession to mining ground, and actual possession, admitted or proven, makes out a *prima facie* case.

Golden Fleece Co. *v.* Cable Co., 12 Nev., 312.
Chapman *v.* Toy Long, 4 Saw., 28.
Brandt *v.* Wheaton, 52 Cal., 430.
Jupiter M. Co. *v.* Bodie Co., 7 Saw., 96.
Zollars *v.* Evans, 2 McCrary, 39.
Roberts *v.* Wilson, 1 Utah, 292.
Sears *v.* Taylor, 4 Colo., 38.
Robertson *v.* Smith, 1 Mont., 410.
Table Mt. Co. *v.* Stranahan, 20 Cal., 198.
North Noonday Co. *v.* Orient Co., 11 F. Rep., 125.
North Noonday Co. *v.* Orient Co., 1 F. Rep., 522.
Campbell *v.* Rankin, 99 U. S., 261.

Faxon *v.* Barnard, 2 McCrary, 44.
Pratus *v.* Jefferson G. M. Co., 34 Cal., 558.

Staking the ground may show the extent of the possession.

Boardman *v.* Thompson *et al.*, 3 Mont., 387.
English *v.* Johnson, 17 Cal., 108.
Table Mt. Co. *v.* Stranahan, 20 Cal., 198.

Working steadily, leaving tools upon the ground, and being upon it at all available times, amounts to actual and continuous possession.

North Noonday Co. *v.* Orient Co., 6 Saw., 299.
Faxon *v.* Barnard, 2 McCrary, 44.

THE INCORPORATION OF RESPONDENT.

The next matter which seems to be urged with seriousness relates to the competency of the proofs offered by the respondent to establish the fact of the incorporation of the "Caledonia Gold-Mining Company" and its compliance with certain requirements of the laws of Dakota Territory. The objections taken are formulated in Assignments of Error, 2, 3, 4, 5, and 6.

The objection interposed to the introduction of Exhibit "A" in the trial court, referred to in the second assignment of errors, is insufficient. That objection was that the copy was "incompetent, irrelevant, and immaterial." It was general and not explicit enough to advise the plaintiff or the court of its exact and true nature. Had it been intimated that the objection was based upon the grounds mentioned by appellants in their argument here, it could and would if necessary have been obviated then and there.

The bill of exceptions must show that the objection to the admission of the evidence was stated specifically and

specially, so that the court and the opposing counsel might be made fully aware of the grounds of the objection, in order that the same might be there intelligently passed upon and the parties then and there given a full opportunity to obviate, avoid, and correct the error. A general objection is not sufficient for this purpose. It must have been plain, clear, precise, and full. Its true import cannot be set out for the first time in the appellate court.

U. S. *v.* McMasters, 4 Wall., 680.
Burton *v.* Driggs, 20 *Id.* 125.
Railroad Co. *v.* Varnell, 98 U. S., 479.
Belk *v.* Meagher, 104 *Id.*, 279–291.
The "Francis Wright," 105 *Id.*, 381.
Stebbins *v.* Duncan, 108 *Id.*, 32.
3 Wait's Prac., p. 205 *Id.*, p. 230.
Dickey *v.* Malechi, 34 Am. D., 130.
Tooley *v.* Bacon, 70 N. Y., p. 37.
Levin *v.* Russell, 24 *Id.*, 251–255.
Williams *v.* Sargeant, 46 *Id.*, 481.
Beckman *v.* Frost, 9 Am. D., 246.
Columbia, Del. B. Co. *v.* Grisse, 38 N. J. L., 39.
Evanston *v.* Gunn, 99 U. S., 660.

In Wood *v.* Weimer (104 U. S., 795), this court said:

"In this connection it is proper to consider the exception which was taken to the introduction in evidence of the deed from Stewart to Terwilliger. The language of the exception, as recorded in the bill of exceptions, is as follows: 'To the reading in evidence of which deed, plaintiff, by his counsel, objected for that it was incompetent, immaterial, and irrelevant.' It is now insisted that 'the attestation of the recorder of deeds of the correctness of the transcript was not certified to be in due form, and by the proper officer, as required by the act of Congress of March 27, 1804, prescribing the mode in which

the public records in each State shall be authenticated, so as to take effect in every other State.' This was not the objection made below, and it comes too late here. There the attention of the court was called only to the competency, materiality, and relevancy of the deed; here to the form of the authentication of the copy. The rule is universal that nothing which occurred in the progress of the trial can be assigned for error here, unless it was brought to the attention of the court below and passed upon directly or indirectly. It is clear that the ruling complained of in this case was in respect to the effect to be given the deed when proved, and not to the form of making the proof."

See also Springer *v.* United States, 102 U. S. 586.

We submit that the proper incorporation of the plaintiff is not put in issue by the answer; the denial of the answer simply relating to the present time does not in its terms relate to the act of incorporation. (Record, p. 15).

When a corporation has gone into operation, and rights have been acquired under it, every presumption should be held in favor of the legality of its existence, and such existence may be proven by user.

Hagerstown T. R. Co. *v.* Crieger, 9 Am. D., 495–497.
Patchen *v.* Peck, 2 Mont., and 567–572.
Field on Corporations, sec. 14.
King *v.* Nat. M. & E. Co., 1 Pac. Rep., 727.

The corporate existence of the plaintiff was fully established by evidence of user, sufficient to support the finding of the court, independently of Exhibit "A," and the defendants, in their motion to correct the findings, made no objection as to anything found with respect to such corporate existence. (Record, p. 53).

Where there is sufficient evidence, properly admitted, to

support the finding, the appellate court will not disturb it because of the admission of immaterial evidence.

Watt *v.* Starke, 101 U. S., 247.

We do not think that the incorporation of the plaintiff can be collaterally enquired into in the territorial courts of Dakota.

O. V. R.R. Co. *v.* Plumas Co., 37 Cal., 360.

Conlan *v.* Quinby, 51 *Id.*, 407, 411.

Uhlig *v.* Garrison, 2 Dak., 76.

The provision of the civil code of Dakota, sec. 376, is as follows:

"The due incorporation of any company, claiming in good faith to be a corporation under this chapter, and doing business as such, or its right to exercise corporate powers, shall not be inquired into, collaterally, in any private suit to which such *de facto* corporation may be a party; but such inquiry may be had, and action brought at the suit of the territory, in the manner prescribed in the Code of Civil Procedure."

The third, fourth, and fifth errors assigned are that the court erred in admitting in evidence Exhibits B, C, and D, each of them having been excepted to as "incompetent, immaterial, and irrelevant."

What we have said in reply to the second assignment applies here also.

The decision in Wood *v.* Weimer, *supra*, so clearly disposes of these three assignments that we refrain from any discussion of them.

The secretary of Dakota Territory certifies to these exhibits over his hand and the great seal of the Territory in these words: "I have carefully compared the foregoing copy * * * filed in this office * * * with the

duly authenticated copy of the original now on file in this office."

This certificate we submit as being *prima facie* evidence of the fact of a duly authenticated copy being on file in the secretary's office.

The remaining assignments of error may be classed under four heads:

1st. Numbers 6, 7, 9, 11, 14, 15, 16, 17, 18, 19, 20, 21, 22, 27, 29, 36, 37, 38, 40, 41, 42, 43, 45, 47, 49, 50, 53, 55, 56, 57, 58, 59, 60, 61, 62, 63, 65, 67, 68, 70, 71, 72, 73, 74, and 83, are all directed against the admission of testimony tending to show acts done or the existence of certain facts during the period anterior to February 28th, 1877, or against the findings of fact and conclusions of law which deal with that period. The findings of fact so brought into question are those numbered from 3 to 12 inclusive.

2d. Numbers 12, 13, 24, 25, 26, 32, and 35, directed against the admission of certain specified documentary evidence.

3d. Numbers 8, 10, 23, 28, 30, 31, 33, 39, 44, 46, 48, 51, 52, 54, 64, 75, 76, 77, 78, 79, 80, 81, 82, 84, 85, and 86, directed against the testimony of certain named witnesses as to occurrences generally, and those after Feb. 28, 1877, and against the findings of fact based on that testimony.

4th. Numbers 87, 88, 89, and 90, which are formal and general.

As to all assignments preceding that numbered 67, the ground of error alleged (when any is pointed out) is that of incompetency, irrelevancy, and immateriality.

Numders 67 to 74 inclusive are predicated on the objection that the land and vicinity in controversy were at the time an Indian reservation.

The remaining assignments (75 to 90) are mainly upon the ground of immateriality or of insufficiency of evidence.

We submit that against the great mass of these assignments it may be urged that they are not sufficiently special and particular.

The record fails to disclose that any objection or exceptions were taken below as to the matters on which are based assignments 41, 42, 44, 45, 46, 47, 48, 49, 50, 51, 53, 54, 55, 56, 57, 58, 59, 61, and 62.

Objections of this character cannot be raised for the first time in an appellate court.

Bell *v.* Bruen, 1 How., 169.
Doe *v.* Watson, 8 *Id.*, 263.
Phelps *v.* Mayer, 15 *Id.*, 160.
Wilson *v.* McNamee, 102 U. S., 572.
Cullum *v.* Wagstaff, 48 Pa. St., 300.
Barnes *v.* Hayick, 15 Iowa, 602.
Staring *v.* Bowen, 6 Bar., 109.
Beckman *v.* Frost, 9 Am. D., 246.
Barrett *v.* Wells, 26 *Id.*, 315.
Hurtfield *v.* Roper, 34 *Id.*, 273.
Hewitt *v.* Buck, 35 *Id.*, 243.
Miller's P. & P., 739, 740.
3 Wait's P., 204, 445.

The assignments grouped under the four heads just noted will now be considered.

I.

The first group relate to the proof of facts existing, and acts done, prior to the 28th day of February, 1877, and at a time when the Black Hills country was embraced by the reservation for the Sioux Indians, set apart by the treaty of 1868. The cardinal proposition of appellant is that, whilst in that state of reservation, no right, possessory

or otherwise, to any part of the reserved tract could be obtained under any of the laws governing the disposal of the public lands. If this were all we should not feel called upon to question the proposition, but the further position is, that acts done within that period are to be considered as not done, and actual physical facts as being without existence. In other words this court is asked to hold that a qualified locator of the public mineral lands who, on the day they became public and subject to exploration, occupation, and purchase, finds himself in the peaceable possession of a located tract, duly marked out upon the ground, and with a proper shaft and actual discovery of mineral made and owned by himself, is not on that day, and can never thereafter become lawfully possessed of the tract or of the improvements thereon, if it should turn out that he had set up his boundaries, sunk his shaft, and made his discovery on a preceding day and before the doing of the executive act by which the general body of the surrounding lands were regularly made subject to location and sale. Our contention is that a qualified locator who, on the day when he may by law appropriate a tract of public land, finds himself in the possession of a defined tract, asserts his title within proper boundaries already set up, and in all things complies with the law respecting such possession, is not required, for the protection of his title or possession, to pull down the existing boundary stakes and set the same up again, nor to make another and different discovery of mineral than that already made.

The occupation of the Black Hills country for mining purposes and the circumstances attending that occupation are matters of public history. The existence of mines of the precious metals in that vicinity became generally known as early as 1874. The inevitable "miners' rush" and consequent occupation of the country soon began. In

March, 1875, an exploring expedition was authorized by the Interior Department. The geologists were escorted to their work by six companies of U. S. cavalry. A preliminary report confirmatory of the existence of minerals was made to the Indian Office by the geologist of the expedition, Nov. 8, 1875. (Report on Indian Affairs 1875, p. 181).

On the 18th day of June, 1875, the President appointed a Commission to visit the Sioux Nation "with a view to secure to the citizens of the U. S. the right to mine in the country known as the Black Hills, and such other rights as could be secured."

The Commission entered upon its work in September following. An agreement was not reached (Report on Indian Affairs, *supra*, p. 184).

The Government was determined, and the act approved August 15, 1876 (19 Stat., 176), making appropriations for the Indian service, provided (p. 192) that "hereafter there shall be no appropriation made for the subsistence of said Indians unless they shall first agree to relinquish all right and claim * * * to so much of their said permanent reservation as lies west of the one hundred and third meridian of longitude." This was the Black Hills country. Negotiations again began, and an agreement of cession was concluded with the Indians in Sept. and October following, which agreement became the act approved Feb'y 28, 1877 (19 Stat., 254).

The determination of the Government to acquire this title, that it might become subject to the mineral laws, being thus publicly advertised was taken as a license to possess the country, and accordingly as appellants allege their predecessors in interest made a location in February, 1876, and called it the "Bobtail," and in June of the same year came also the predecessors of the respondent, and made and

so far as observance of every requisite of law or custom is concerned, perfected their location of the Caledonia Lode. A large number of other mining properties were located within the same period, as is disclosed by this record, and whenever, for any cause, they have been called in question the truth with respect to the date of their location has been freely stated, and there has been no suspicion anywhere that a property so located, which was continuously occupied and developed down to the extinguishment of the reservation and thenceforward without a break either in time or the performance of conditions, had in it any infirmity whatever, much less a fatal defect, growing out of the disclosure of the things done prior to February 28, 1877. If it is necessary to suggest a process by which the things done upon the tract and in existence there on the 28th of February inured to the benefit of the locator for the initiation of a lawful right of possession according to the boundaries set up, the natural and sufficient explanation is that there was an adoption of the things theretofore done for the purposes of the present, for which they were all-sufficient, and as the basis of any added requisite which law or regulation might require for the future.

We are not contending now that any manual performance of conditions done before February 28, 1877, vested a defensible right of possession *during that period;* we are only contending that no disability to initiate a location in all respects valid when the reservation was extinguished resulted from the previous trespass, if trespass it was.

Much of the testimony objected to because of its reference to facts occurring before Feb'y 28, 1877, was introduced for the purpose of showing that down to and long after that date none of the facts necessary to a valid location had an existence on the Bobtail ground; that in very truth there was no discovery of mineral—no location

staked off or otherwise marked; that there had been no sufficient expenditure for work, and that if there ever had been claimants to the so-called Bobtail tract they had abandoned it before that day, and that by reason of these things it of necessity followed that there was nothing that could be adopted as a compliance with law or regulation when the lands became subject to location.

Appellants as defendants below had expressly made this issue. They had set up in their answer, *by way of counter claim*, that Ireton and others had discovered the Bobtail on 24th Feb'y, 1876, and had thereupon caused a shaft to be sunk, "a discovery stake and location notice to be erected," and the necessary work and improvements to be done, and that the rights so initiated in the month of March, 1877, became the property of the defendant Mahan by purchase from Ireton and his co-locators. (Record, pp. 15 and 16).

This was good pleading, and it was put in issue by plaintiffs' reply. The testimony complained of was relevant to that issue and material to its determination. Neither the court below nor the parties, or either of them, failed to perceive at any stage of the controversy the importance of the question of who, on the 28th day of February, was in the possession of the disputed tract; both parties recognized the importance of the settlement of that question, made it an issue in the case, and must stand by the findings made.

Abandonment, as this court well understands, is a question of fact as well as of law and rests upon the intention of parties made known by their acts and statements.

Mallett *v.* U. S. G. M. Co., 1st Nev., 156.
Weill *v.* Lucerne & Co., 11th *Id.*, 201, 212.
Oreamuno *v.* U. S. S. M. Co., 1 Nev., 215, 217.
Judson *v.* Maloy, 40 Cal., 299.

Davis *v.* Perle, 30 *Id.*, 630, 637.
Davis *v.* Butler, 6 *Id.*, 511.

So that it here becomes a question of great importance to enquire as to whether these things had been done in the year 1876 as claimed; whether the grantors of the defendants had really, by acts such as working and staking the claim, shown good faith and an intention of holding the claim, or whether they had committed such acts as would have indicated an intention of abandoning it; what statements they had made, what facts in this connection were indicated or communicated to the defendants, or either of them, and what was their conduct. For this purpose this testimony was admitted, as will be seen. Statements made and acts done by parties claiming may always be shown in this regard.

2d Whart. Ev., 1156, 1160.
1st Greenl. Ev., 108, 109, 123, 180, 189.

The court will consider that although in 1876 these miners may have had no right to make a mining location upon this ground, yet at the time these locations were made it is only fair to presume that they were made by the miners in good faith, ignorant of the true position of affairs, and that all the acts and statements made during this time were made *bona fide* as an expression of actual intention towards this property, and can be taken with acts done and statements make subsequent to February 28th, 1877, to establish and confirm the true state of affairs in connection with this property at that time.

Defendants claim to have adopted the staking of 1876 at the pretended re-location of 1877. Is it not competent to show that there was no staking done in 1876?

We submit that the evidence admitted is important.

This case greatly rests upon the point as to which party was in the actual possession of the property, of the land in controversy, on the 28th day of February, 1877, holding the same as a mining location—the locators of the Bobtail or of the Caledonia—for whichever party was in the possession and use of it at that time, under their respective claims, had a prior right thereto.

Therefore it is competent to show the expressed intention and existence of facts in relation thereto prior to the 28th day of February, 1877, to rebut the presumption or allegation of the defendants as to the possession of their grantors on this date.

Again, we assume that the defendants cannot complain of the admission of evidence of facts through the occurrence of which they have set up and claimed their title. Either this title must be open to critical inspection or it must be abandoned, as well as all acts and things done under and in connection with it by defendants.

It seems that at the date of the trial below there was some question in the mind of both the court and the parties as to whether or not valid initiatory steps under the mining laws might not have been taken prior to February 28.

As before remarked the issues for trial were so presented by the pleadings as to presuppose the effectiveness of such prior transactions.

In overruling an objection to testimony addressed to that period the court put it upon the ground—

1st. Of the then uncertainty of the question "of the effect of the existence of the Indian reservation including this property in controversy until the 28th of February, 1877, treaty."

"2d. Because I deem evidence of facts occurring prior to such date, when they relate to and are properly con-

nected with and tend to establish the existence of facts on and after February 28, 1877, essential to a valid mining location material and relevant." (Record, pp. 78 and 79).

It thus appears that the court below received the evidence of facts occurring prior to February 28 so far as they were connected with and tended to establish the existence of facts on that day.

We contend that upon these grounds the testimony was relevant and competent.

But examination of the findings will show that the trial court, with great pains and care, distinguished between any problematical rights possibly arising out of the situation as it was prior to February 28, and those resting on facts proved to exist upon and from that day.

The conclusions of law are equally clear in their discrimination.

It cannot be gainsaid that there was a trial of the rights of the contending parties covering the period of time and upon testimony to which it is admitted there is no valid objection. If there was testimony admitted bearing upon extraneous matters, as seems to be the contention of the appellants, or that which was merely irrelevant or immaterial, this court will not for that cause reverse the judgment unless it appear that injustice and wrong resulted from its admission. Appellate courts are not constituted for the correction of mere inartificial methods of procedure.

Field *et al. v.* U. S., 9 Peters, 202.
Lancaster *v.* Collins, 115 U. S., 222.
Arthurs *v.* Hart, 17 How., 6.
Priest *v.* Union C. Co., 6 Cal., 170.
State *v.* Berryman, 8 Nev., 262.
Caulfield *v.* Bogle, 11 N. W. Rep., p. 511 (Dakota).
Forest *v.* Forest, 25th N. Y., p. 501.

Speers *v.* Fortner, 6th Iowa, p. 554.
Green *v.* Allen, 32d Ala., p. 215.
Zugler *v.* Wells Fargo, 28th Cal., p. 264.
S. B. L. Ass. Co. *v.* Christy, 41st Cal., p. 501.
Baldwin *v.* Bonheimer, 48 Cal., 433.

To obtain a reversal it must be conclusively shown to the appellate tribunal that the error was material and worked grave and serious injury to the appellants, or it must be shown that immaterial evidence entered into and affected the merits of the judgment.

Clark *v.* Lockwood, 21st Cal., 220.
Hills *v.* Barney, 22d *Id.*, p. 240.
Kidd *v.* Tupple, 22d *Id.*, 255, 262.
Mining Co. *v.* Taylor, 10th Otto, pp. 37, 42.
Wait's P., 3 V. P., pp. 409, 444.
Wait's P., 4 V., p. 239.
Miller's P. & P., p. 741.
Johnson *v.* Chase, 30th Iowa, p. 308.
Union Bank *v.* Planters' Bank, 31st Am. D., pp. 113, 116.
Noonan *v.* Ilsley, 22 Wis., 27.
Fenalon *v.* Hogaboom, 31 *Id.*, 172.

II.

The second group of assignments question the admissibility of certain documentary evidence.

Nos. 12 and 13 are on the ground that the admitted evidence had relation to the period before February 28. We have already considered that ground. Nos. 24 and 25 are directed against the chain of conveyances by which the possessory title of the locators and original claimants became vested in the respondent. If we have caught the

point of objection here interposed, it is that even reference for description to a document which happened to have been penned prior to February 28, 1877, is for some cause forbidden. If it is intended to go beyond this, and to hold that the first of the deeds introduced, and consequently the two that followed, were void instruments conveying nothing on the ground of a too early location of the premises, we refrain from any further discussion of that point. Inspection of the deed (Record, p. 110) will show that it is good in form, and that it was made after there had been eighteen months of possession subsequent to February 28, with full compliance with law.

Specification No. 32 has to do with the mining rules and regulations of the mining district embracing the land in controversy, which were offered in evidence by plaintiff. Defendant objected to their introduction, as upon their face they purport to be rules and regulations to govern locations within a district then part of the Sioux Indian Reservation. They were admitted on condition that plaintiff show that these regulations were recognized and in force after the 28th of February, 1877, in that district. (Record, p. 123). And thereupon it was shown by the plaintiff that on the 6th day of March, 1877, or as soon as notice reached the Hills that the act of February 28 had been passed, the miners held a mass meeting, and, in their own language, "re-enacted and legalized the laws heretofore passed and adopted in this district." (Record, p. 126).

The power to make regulations governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to certain requirements, is expressly conferred on the miners of each mining district by sec. 2324 Revised Statutes.

The plaintiff, willing to have his performances tested in

presence of the regulation made, offered them in evidence. If, for the reason intimated by defendant in his objection, or for any reason, the supposed regulations of that district were invalid, then the plaintiff was not under any defined restrictions as to those matters committed to the miners for regulation, and had no need to show compliance beyond the general directions contained in the laws of the Territory and of the United States. It is difficult to comprehend the motive of this objection.

Nos. 34 and 35 are to the effect that the copy of the location certificate of the Caledonia Lode dated March 2d, 1878, is incompetent, irrelevant, and immaterial. Looking for something more definite, we find from appellants' brief that the real objection as there explained is that there is an error as to course and distance in the said copy. On page 64 of the brief of appellants there is a fantastic diagram intended, we presume, to illustrate the understanding counsel for appellants have of the effect of the error. Turning to record, page 132, it will be seen that Smith, who made the survey and still had the original field-notes in possession, testified on cross-examination that the mistake was a mere clerical error; that it only affected one of the end lines, and that any person closing the lines would observe it. The survey was truly and correctly made; the required monuments were erected at the proper points; the field-notes were correctly made out, but in transcribing a copy for a special use one of the courses was misread and incorrectly copied. The monuments actually erected at the proper points remained.

Monuments control courses and distances.

Land Company *v.* Saunders, 103 U. S., 316.

Pollard *v.* Shively, 5 Colo., 309.

The essential requirement is that "The location must be

distinctly marked on the ground so that its boundaries can be readily traced." (R. S., sec. 2324).

III.

The specifications of error enumerated in the third group are based on objections taken, or alleged to have been taken, below to the testimony of certain named witnesses as to occurrences happening in whole or in part after 28th Feb'y, 1877, or against findings of fact based on that testimony.

Specifications 8 and 10 declare the testimony of the witness Murphy (Record, pp. 86 to 90) immaterial, irrelevant, and incompetent. The subject of the testimony was the notice of location and claim set up on the ground on the day of the original discovery (June 21, 1876), and which was on the same day filed for record in the proper district (Ex. F, p. 87), and the supplementary notice dated and filed March 15, 1877 (Ex. G, p. 88).

The making and record of such notices are authorized by the local regulations of the district, and are within the purposes of the mining statutes of the United States.

Sec. 5, Regulations of Whitewood, Dist. Record, p. 123.

Sec. 2324, R. S.

Testimony that these regulations and statutory requirements had been observed was therefore material, relevant, and competent. It was responsive to the issues as joined in the pleadings.

Specification 23 has no objection noted below on which to stand. (Testimony of Carney, Record, p. 109).

Specifications 28, 30, 31, 33, 44, and 46 state objections to the testimony of the witnesses Workman, Gushurst,

O'Neil, Elliott, and Gunn, so far as it related to occurrences on or after February 28, 1877; but the objection taken on the trial was to so much of the evidence as related to acts done or statements made prior to Feb. 28, 1877 (Record pp. 116, 118, 123, 128, 99, and 100). But the evidence, and every word of it, is pertinent and admissible. To the testimony of Manning, Mahan, Claggett, Maclay, and Murphy the subject of assignments No. 48, 51, 52, 54, and 64, no exception was noted below.

Assignment No. 39 classes the deposition of W. R. Keithley as incompetent, irrelevant, and immaterial; on what ground or reason was not intimated in the trial court. Certain depositions of absent witnesses, to be used on the trial of the cause on the part of plaintiff, were on file in the clerk's office. The office, with its contents, was consumed by fire before the cause came on for trial. (Record, p. 234). Whilst on the files of the clerk's office copies were made and compared by Keithley and another. Keithley himself being about to leave the Black Hills his deposition was taken, in which (Record p. 235) he stated his service in that particular and identified the copies made, and they were marked, respectively, Exhibits A, B, C, D, E, F, G, H.

It was upon the offer, at the trial below, to introduce in evidence on part of plaintiff this deposition of Keithley that the defendant objected in the general terms quoted. The insufficiency of the objection is apparent (Burton *v.* Driggs, 20 Wall., 125). In the Supreme Court of Dakota the thing urged in argument under this general specification was that Keithley was not proven to be out of the territory and jurisdiction of the trial court prior to the reading of the deposition. If that had been the objection made below, the plaintiff would have been in position to have instantly supplied the proof of absence, or if it had been disclosed that he had in fact returned to the jurisdiction of the court to have produced him in person.

In this court objection is made, and for the first time, that the exhibits covered by Keithley's deposition, to wit, Exhibits A to H inclusive, were improperly admitted in evidence because of certain alleged irregularities and deficiencies in the matter of the notice of the time and place of taking, or in the matter of the sufficiency of some certificate of the officer before whom the same was taken. (Appellant's Brief, p. 80).

In addition to the fact appearing by the record that none of the matters of objection or exception preferred in this court were brought to the attention of the court below, it is clear that these objections as now made are to the *form* of the evidence, whilst the objection below was to the effect. This is not permissible.

Springer *v.* U. S., 102 U. S., 586.

Wood *v.* Weimer, 104 *Id.*, 786.

The laws of the Territory of Dakota specially provide for the use of copies when the originals have been destroyed or lost. No special form of proof is prescribed.

"If any process, original pleading, or any other paper be lost or withheld by any person, the court may authorize a copy thereof to be filed and used instead of the original."

C. of C. P., Dak., sec. 525.

In regard to the manner and mode of taking depositions, it is always deemed to have been regularly done.

Hinckley *v.* Beckwith, 23 Wis., 328.

As to receiving copies of the depositions, the objection is insufficient, as it must be specifically pointed out what is the objection to the admission of the certified copy.

Evans *v.* Sprague, 30 Wis., 303.

Ruch *v.* Rock Island, 97 U. S., 693.

Objections to depositions should be taken on the trial.
Dean & Chaplain of Ely *v.* Warren, 2 Atkyns, 189.
Winans *v.* New York R.R. Co., 21 How., 88.

The remaining assignments of error under this group are aimed against the findings of fact. They are numbered from 75 to 86 inclusive. In Nos. 75, 76, 77, 81, 84, and 85, the objection stated is that the findings are "not supported by sufficient evidence."

To Nos. 78, 79, and 82 the same objection is made, and the additional one is suggested that these findings are immaterial.

This is equivalent to saying that as to the material findings there was some evidence to sustain them. Evidence *conducing* to sustain a verdict or finding is sufficient.

Hepburn *v.* Dubois, 12 Pet., 345.

Findings that are in fact immaterial will not be presumed to have prejudiced the party against whom the finding was made. Judgment will not be reversed for such error.

Lancaster *v.* Collins, 115 U. S., 222.

Assignment No. 83 has been considered under the first group. No. 80 raises no question which at any stage of this controversy was material to the determination of any right or rights of either the appellant or respondent.

IV.

The fourth and last group, No. 87 to 90 inclusive, are merely formal and general.

THE FINDINGS OF FACT.

The piece of mining ground actually in controversy between the parties was only a portion (about one-third) of

the quantity which may be lawfully possessed and purchased by a qualified person under the laws of the United States.

The appellants (defendants below), in support of their right to the present possession of that particular tract and of their right to have issued to them the patent of the United States for *the whole of* the Bobtail claim, stood upon the validity of their title to the whole claim, by reason of alleged compliance by themselves and predecessors with the laws and regulations governing the acquisition of title to the public mineral lands. They denied any claim of the respondent to the particular tract, or to a larger or any tract embracing it. The appellants proceeded on the theory that the defence of the particular tract in controversy could only be made good by establishing in themselves a good title to the Bobtail claim as a whole.

They saw fit to set up in their answer, *as a defence and counter claim*, the validity of the Bobtail location. On the trial the proofs were addressed to that issue. The findings of fact responsive to that state of proof and pleadings begin at No. xx (Record, p. 39), and continue to and embrace Finding No. xxxiv. Following the invitation of appellants' answer and counter claim, the court found the facts within the period between the date of the alleged Bobtail location and the restoration of the general tract of country to the body of the public domain (February 28, 1877). These findings are both special and particular. The substance of them is that the initial steps of a mining location called the Bobtail were taken in February, 1876, by three persons who had the personal qualifications required by the statutes; that they partially staked or marked their location on the ground, but in such a manner as to include a width of six hundred feet instead of three hundred, as prescribed by law; that before the 5th

day of June following these locators "abandoned all of their interest in and to the said Bobtail mining claim;" and that, when the 28th day of February and 1st day of March, 1877, arrived, neither the locators nor any other person claiming any right or interest in the Bobtail claim was in the actual or other possession thereof, and that neither on those days nor afterwards, until the month of April, 1877, were there any posts or stakes marking the corners or boundaries of said claim, either as originally located or as now claimed. To these and all findings referable to the period down to February 28, as we have seen, the appellants object, because of their insistence that nothing could be then lawfully done under the mineral laws. It seems apt to point it out here that, if the objection be held good, it can have no effect on the judgment, for the objection itself is but an assertion that, for every reason, all that was claimed and done by appellants or their predecessors before the day stated was of no effect, which is the conclusion reached by the court, for special reasons. In this view the findings on this subject become immaterial, and, since there are findings on the material issues, the judgment will be sustained.

Murphy *v.* Bennett, 9 Pac. Rep., 738.
Porter *v.* Woodward, 57 Cal., 535.
McCourtney *v.* Fortune, 57 *Id.*, 617.
Knowles *v.* Seale, 64 *Id.*, 377.

But in connection with these findings we have the fact ascertained that on the 28th day of February, nor until March 25, 1877, was there a claimant to the Bobtail Lode, or any tract or piece of ground identified by post, corner, stake, or other monument as having ever been claimed for mining purposes in connection with a location under that name.

Findings 27, 28, and 29, Record, p. 41.

That the only fact transpiring on the 25th day of March having seeming connection with the Bobtail claim was the delivery to the appellant Mahan of a deed of quit claim purporting to convey to him the abandoned interest of one of the original claimants. That until the month of May following no act was done which served to indicate that appellants or any predecessor or person in privity with them asserted an interest under the Bobtail location, and this assertion consisted in filing in the office of the register of deeds of the county on May 10, 1877, a copy of the old location notice of February, 1876, to which was added a supplementary notice signed by Mahan. That neither the appellants nor their predecessors performed labor or made improvements of the required value of one hundred dollars per annum for the period next after the 24th of February, 1876, or within one year next after the 28th day of February, 1877, and had not resumed work therein after the 24th or the 28th day of February, 1878, and before the 2d day of March, 1878.

These findings are abundantly sustained by the evidence. They are of great significance without the aid of those other findings which solely relate to the performance of conditions by the Caledonia claimants, and fully sustain that location in its entirety. An applicant for a mining-claim patent is required to show compliance with all of the requirements of the laws, local and general, bearing on the subject, among which are the distinct marking of boundaries on the ground, the record of the notice of claim, the performance of one hundred dollars worth of work each year. If no adverse claim is filed, the General Land Office becomes the forum for the trial of the sufficiency of the alleged compliance with law. But if adverse proceedings are begun, then the courts become the forum, and the judgment roll filed in the General Land Office is decisive of the rights of any applicant. (R. S., secs. 2325 and 2326).

If the application for patent under the Bobtail claim had rested for success on the performance of conditions at any time from Feb'y 29, 1877, or earlier, down to April, 1877, it would have failed for want of performance without the aid of adverse proceedings. The finding is that there was neither claim nor claimant under the Bobtail proceedings on or from Feb'y 28 to March 25, 1877. The force and effect of the findings is that the tract in controversy was free and clear of all claim, or right to claim, growing out of anything done in connection with the Bobtail location, and this finding beyond controversy embraces the period from Feb'y 28 to March 25, 1877. It is not controverted that the plaintiff (respondent) had the actual possession of the disputed tract and has continuously held it.

For the plaintiff (respondent) it is found that on the said 28th day of February that the predecessors of the respondent were in possession of the Caledonia location, including the tract in controversy, and that every requirement of a valid mining location was there present, peaceably possessed, and actually owned and used by the said predecessors of respondent; that they possessed the necessary qualification of citizenship of the United States, and that their possession and right of possession so found to exist on that day continued uninterruptedly with performance of all continuing requirements to the day of appellants' application for a patent. (Findings Nos. vi to xix inclusive).

We submit that these findings are responsive to the issues tendered by the pleadings. No failure of proof as to any one of them has been pointed out to the court.

There was no question raised below, and there is none presented here by appellants which is of decisive importance.

The issues were simple, and the proofs requisite to sus-

tain them were as to facts and acts openly done upon or in connection with the tracts of land in question. We reiterate what has been in substance already said that almost without exception the objections taken below in the district court were merely conventional. With but little exception they were on the ground that the testimony offered or thing found was "incompetent, irrelevant, and immaterial." The objection so interposed was generally against the body of the testimony of a witness, most of which was clearly competent, material, and relevant, and without directing attention to any particular part intended to be assailed.

Where the exception seems to be against the finding or decision because of insufficiency of the evidence to sustain it, there is the same want of particularity.

This is condemned, and is an insufficient presentation of exceptions under the Code of Dakota:

"No particular form of exception is required. The objection must be stated, with so much of the evidence or other matter as is necessary to explain it, and no more. But when the exception is to the verdict or decision upon the grounds of the insufficiency of the evidence to sustain it, the objection must specify the particulars in which such evidence is alleged to be insufficient."

Code of Civ. Proc., sec. 279.

Examine assignment No. 82. It is there set up that there was no competent legal proof of certain acts. This, it appears to us, does not conform to the requirements of sec. 279, C. C. Pro., nor to the rules of practice generally. It is not for appellants to determine what is competent or incompetent legal evidence, but it is their duty to set out the testimony upon this question in their exception for the judgment of this court, or state that there is no testimony

upon the matter, and not state that there is testimony, but that, in their opinion, it is not competent legal testimony.

There is no rule more insisted upon by appellate courts than that which requires the party who complains of error to show wherein the error consists, and which rejects as wholly insufficient objections which are general in character.

Brown *v.* Tolles, 7 Cal., 398.
Pralus *v.* Pac. G. & S. M. Co., 35 *Id.*, 30.
Beans *v.* Emanuelli *et al.*, 36 *Id.*, 117.
Butterfield *v.* C. P. R. Co., 37 *Id.*, 381.
Spangel *v.* Dellinger, 38 *Id.*, 279.
Brumagin *v.* Bradshaw, 39 *Id.*, 24.

Apologizing for the length of this brief, in view of the ninety assignments of error presented for the courts consideration, we invoke against the appellants the remark of the court in Phillips, &c. *v.* Seymour *et al.* (91 U. S., 648): "The object of the rule requiring an assignment of errors is to enable the court and opposing counsel to see on what points the plaintiff's counsel intend to ask a reversal of the judgment, and to limit the discussion to those points. This practice of unlimited assignments is a perversion of the rule, defeating all its purposes, bewildering the counsel of the other side, and leaving the court to gather from a brief, often as prolix as the assignments of error, which of the latter are really relied on."

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APPENDIX CONTAINING AN INDEX ABSTRACT REFERRING TO THE EVIDENCE UPON THE PRINCIPLE POINTS IN ISSUE.

I.

The corporate capacity of respondent, the Caledonia Company.

Defendants' (Appellants') Answer, Rec. p. 15.
Articles of Incorporation, Exhibit A, Rec., p. 70.
Articles of Incorporation, Exhibit B, Rec., p. 72.
Appointment of Agent, Exhibit C, Rec., p. 74.
Appointment of Agent, Exhibit D, Rec., p. 75.
Deeds to Caledonia Company, Rec., p. 113.
Testimony of J. M. Murphy, Rec., p. 135.
A. J. Rigby, Rec., p. 133.

II.

Abandonment of the Bobtail.

Testimony of Michael Gibbons, Rec., p. 265.
Wm. Gunn, Rec., p. 271.
M. Moore, Rec., p. 278.
Michael Lynch, Rec., p. 285.
F. Rayborg, Rec., p. 150.
D. G. Chizum, Rec., pp. 144, 246.
H. S. Ireton, Rec., pp. 139, 190.
Wade Porter, Rec., p. 289.
A. J. Rigby, Rec., p. 289.

III.

No work on the Bobtail until long after February 28, 1877.

Testimony of Mathew Moore, Rec., p. 278.
Wm Gunn, Rec., pp. 271, 272, 274, 275, 276.
Michael Gibbons, Rec., p. 265.
Jas. Lynch, Rec., p. 282.
Robt. Cooper, Rec., p. 283.
Michael Lynch, Rec., p. 285.
P. A. Gushurst, Rec., p. 287.
W. H. Workman, Rec., p. 288.
Henry Lackey, Rec., p. 289.
A. J. Rigby, Rec., p. 289.
C. E. Carney, Rec., pp. 287, 288.
Jno. Manning, Rec., pp. 282, 284.
P. Ault, Rec., p. 229.

IV.

Non-existence of the Bobtail as a legal mining location on February 28, 1877, on account of its boundaries not being so established that they could be readily traced. No evidence that the Bobtail was ever restaked until surveyed in the fall of 1877. The claim originally staked in midwinter when the ground was frozen and its stakes were very insecurely established.

Testimony of H. S. Ireton, Rec., p. 290.
Thos. E. Carey, Rec., pp. 164, 166, 167.
Daniel G. Chisum, Rec., pp. 251, 253.
H. S. Ireton, Rec., p. 139.
D. G. Chisum, Rec., p. 144.
M. Gibbons, Rec., p. 265.
Wm. Gunn, Rec., p. 273.
Robt. Cooper, Rec., pp. 283, 284.
M. Lynch, Rec., p. 285.
Wm. Workman, Rec., p. 288.

Henry Lackey, Rec., p. 289.
C. E. Barney, Rec., p. 287.
Jno. Dawson, Rec., p. 293, 294.

V.

Forfeiture of "Bobtail" by reason of failure to do the work or make the improvements required by law in the year ending February 28, 1878.

Testimony of Frank Raborg, Rec., pp. 150, 151.
Robt. Cooper, Rec., p. 284.
Wm. Gunn, Rec., pp. 285, 276.
John Mahn, p. Rec., 284.
P. Ault, Rec., p. 229.
A. J. Rigby, Rec., p. 289.
F. A. Babcock, Rec., p. 293.
M. Gibbons, Rec., pp. 265, 266, 267, 268.
Jas. Lynch, Rec., 282.

VI.

The continued and actual possession of the Caledonia by its owners from February 28, 1877, up to the date of the trial below.

Testimony of M. Lynch, Rec., pp. 79, 80, 82, 83.
H. Lackey, Rec., pp. 91, 92, 93, 94, 108, 109.
Robt. Cooper, Rec., pp. 97, 98.
Robt. Curlin, Rec., p. 98.
Wm. Gunn, Rec., pp. 99, 100.
M. Moore, Rec., p. 100.
J. Lynch, Rec., pp. 101, 103, 104.
M. Heffron, Rec., pp. 106, 108.
Wm. Workman, Rec., p. 116.

P. A. Gushurst, Rec., pp. 117, 118, 120, 121.
Jno. O'Neil, Rec., p. 122.
Louis P. Elliot, Rec., p. 128.
George Kennedy, Rec., p. 132.
A. J. Rigby, Rec., pp. 133, 134.